

The Tenth Circuit Historical Society  
and  
The Federal Bar Association  
Present

# PUBLIC ACCESS AND THE COURTS:

A Perennial Problem Complicated by Technology,  
Insights from Participants in the Brian David Mitchell Case

October 12<sup>th</sup>, 2011  
5:30 p.m. to 7:00 p.m.  
Courtroom 420, Fourth Floor

## PANEL PARTICIPANTS

### **Moderator:**

Randy L. Dryer: A graduate of the University of Utah College of Law, Mr. Dryer practiced with Parsons Behle & Latimer as a media lawyer for over 30 years until recently becoming a full time professor at the University of Utah. He has a joint appointment in the Law School and Honor College and teaches courses in media law, pretrial practice and crisis management.

### **Panelists:**

Dale A. Kimball: Judge Kimball is a senior United States District Court Judge for the District of Utah. He presided over the Brian David Mitchell case. A graduate of the University of Utah law school, Judge Kimball was a professor of law at the J. Reuben Clark School of Law at Brigham Young University and practiced in Salt Lake City before taking the federal bench in 1997.

Diana Hagen: Ms. Hagen is the Chief of the Appellate Section of the U.S. Attorneys Office for Utah. She was one of the prosecutors in the Mitchell trial. She is a graduate of the University of Utah College of Law, where she is an Adjunct Professor teaching Appellate Practice. She clerked for Utah Federal Court Judge Tena Campbell and worked in private practice before joining the U.S. Attorney's Office in 2001.

Parker Douglas: Mr. Douglas is an Assistant Federal Defender who represented Brian David Mitchell. A graduate of the S.J. Quinney College of Law, he clerked for Utah District Court Judge Tena Campbell and Tenth Circuit Court of Appeals Judge Michael McConnell. Prior to joining the Federal Defender's Office he worked for Latham & Watkins in Washington, D.C.

Michael O'Brien: Mr. O'Brien has practiced with Jones, Waldo, Holbrook & McDonough for the past 25 years and has represented numerous local and national media clients in access matters and defense of libel and invasion of privacy claims. He represented various media organizations in connection with the Mitchell trial. He is a graduate of the University of Utah, College of Law, where he has served as an Adjunct Professor of law.

Pat Reavy: Mr. Reavy is a staff writer for the Deseret News and other Deseret Media companies and covered the Mitchell trial. He received his journalism degree from Michigan State University and has reported on numerous high profile judicial proceedings during his 20 years of reporting in Utah. He has received numerous journalism awards for his writing.

United States of America v. Brian David Mitchell  
2:08 cv 125 DAK

A two page indictment was filed in the United States District Court for the District of Utah on March 5, 2008 and randomly assigned to Judge Dale A. Kimball. The indictment charged Brian David Mitchell and Wanda Eileen Barzee with kidnapping of a minor and transporting the minor to California. Eleven hundred and seventy seven days and four hundred and seventy nine docket entries later, Judge Kimball's judgment was entered, sentencing defendant Mitchell to life imprisonment in a federal correctional institution. The focus of our discussion tonight are the legal issues which arose as the court provided a fair public trial of the criminal offense.

At several points in the adjudication process, the press, representing the interests of the public, sought access to documents and other evidence. Both prosecution and defense asserted their interests in keeping certain material confidential. The court needed to balance these competing priorities in assuring that the criminal justice system did provide a fair public trial.

There were physical access issues which arose from press and members of the public who wanted to attend the court proceedings. The deliberative court process and creation of the official record of proceedings by court reporter transcripts clashed with the current culture of immediate access by a variety of media, print, visual and Internet access.

There were legal issues of access to information before the court during both the preliminary inquiry as to mental competence, screening and selection of the jury venire and the trial as to the guilt of the defendant. Ironically, the defendant's motion to change venue due to extensive pretrial publicity was widely publicized in the media, further complicating the issue before the court.

Access issues arose early in the proceeding. One of the first questions was whether all documents relating to the competency hearing would be sealed automatically by the court. Judge Kimball requested briefing on that issue ( [dkt #101](#) ) . Media entities sought leave to intervene. The court subsequently ruled that docket entries should be unsealed and that redacted versions of briefing would be filed. ( [dkt #120](#) ) The parties stipulated as to what materials would be released in relation to the competency hearing.

After the court found Mr. Mitchell competent, the media sought copies of video shown during the competency hearing. The court allowed public inspection and viewing at the courthouse but denied release of copies prior to trial, weighing the public's right to access against the defendant's right to a fair trial. ( [Dkt #240](#) )

When the defendant sought a change in venue, the court needed to rule on the issue of local media coverage possibly tainting the jury pool. The court ruled against the change of venue under the constitutional standard but reserved ruling under Rule 21 of the Federal Rules of Criminal Procedure until after reviewing answers to jury questionnaires. ( [Dkt #289](#) )

Access to juror questionnaires became an issue for the court in October, 2011. The court released blank copies of questionnaires and released portions of the information which had been used in making rulings. Redacted copies were released at the time of individual voir dire and potential jurors were allowed to request redaction of personal information. ([Dkt# 362](#)).

Another area where public interest conflicted with court processes was the presence in the courtroom during individual voir dire. As individual members of the panel were interviewed, the court limited the media's presence to nine pool reporters and two sketch artists.

During the trial, the court released copies of exhibits entered into evidence that day. One exhibit that the media wanted immediate access to was the police interrogation video. The court did not release the video but did release a transcript of the video. The video itself was released to the media after the trial.

The participants of our panel discussion this evening will share their perspectives of the Mitchell trial and the balancing of the interest of the public in the kidnapping of Elizabeth Smart and the obligation to provide a fair trial for Brian David Mitchell.

## TIMELINE OF EVENTS

June 5, 2002	Elizabeth Smart abducted from her Federal Heights, UT home.
June 8, 2002	Abduction highlighted on <i>America's Most Wanted</i> .
October 12, 2002	Mary Katherine Smart tells her parents the abductor's voice belonged to the panhandler "Emmanuel"
February 15, 2003	<i>America's Most Wanted</i> profiles "Emmanuel"
February 16, 2003	Family of Brian David Mitchell identifies him as "Emmanuel"
March 5, 2003	Brian David Mitchell, Wanda Eileen Barzee, and Elizabeth Smart return to Utah after several months in California
March 12, 2003	Elizabeth Smart found with Mitchell and Barzee in Sandy, UT.
March 18, 2003	Mitchell and Barzee charged with Aggravated Kidnapping, Aggravated Sexual Assault, Aggravated Burglary, and Attempted Aggravated Kidnapping in Utah State District Court.
July 26, 2005 and December 18, 2006	Mitchell found incompetent to proceed to trial by Judge Judith S. Atherton.
March 5, 2008	Mitchell and Barzee indicted in U.S. District Court for Kidnapping and Unlawful Transportation of a Minor
September 28, 2009	Judge Dale Kimball rules Elizabeth Smart can testify as part of the competency hearing for Mitchell
October 1, 2009	Elizabeth Smart testifies at competency hearing
October 13, 2009	The court addresses issues relating to improper sealing of documents relating to the competency hearing.
October 19, 2009	Media entities attempt to intervene on the issue of sealed documents
October 26, 2009	The court rules that no portion of the competency hearing is to be under seal and orders the unsealing of docket entries and requests parties submit redacted versions of briefing
October 30, 2009	Parties and media entities stipulate to which materials will be released relating to the competency hearing.
November 17, 2009	Wanda Eileen Barzee pleads Guilty to both counts of the Indictment.
November 30, 2009	Competency hearing for Mitchell held for 10 days
March 1, 2010	Judge Dale Kimball finds Mitchell competent to stand trial.
March 8, 2010	Judge Kimball partially granted the media's request to view videos played during competency hearing - denied physical release of tapes.
May 21, 2010	Wanda Eileen Barzee sentenced to 180 months in federal prison.
June 11, 2010	Defense team files a Motion for Change of Venue.
July 29, 2010	The court hears argument on the Motion to Change Venue
August 16, 2010	Memorandum Decision issued by Judge Kimball denying in part and deferring in part the Motion for Change of Venue
October 21, 2010	The court denies the Motion to Change Venue after reviewing responses to the jury questionnaires.  Media entities request access to blank and completed juror questionnaires.
October 28, 2010	Petition for Writ of Mandamus and Motion to Stay Trial filed by defense team are denied by the Tenth Circuit Court of Appeals.
October 29, 2010	Order re: media's request for juror questionnaires entered. Order also addresses media presence in the courtroom during trial.
November 1, 2010 - December 10, 2010	Jury trial held for Brian David Mitchell with Guilty verdicts to both counts entered on December 10, 2010.
May 25, 2010	Brian David Mitchell Sentenced to Life in federal prison
August 3, 2011	Salt Lake Tribune granted release of physical copy of police interrogation video after being denied the request on December 3, 2010

## PROMINENT PARTICIPANTS

### **Judge Dale A. Kimball**

*Senior United States District Judge*

### **Brian David Mitchell**

*Defendant*

### **Wanda Eileen Barzee**

*Defendant*

### **Counsel for the United States**

**Brett L. Tolman**

*Former U.S. Attorney for the District of Utah*

**Felice J. Viti**

*Assistant U.S. Attorney*

**Alicia H. Cook**

*Deputy Salt Lake County District Attorney*

**Diana Hagen**

*Assistant U.S. Attorney*

**David F. Backman**

*Assistant U.S. Attorney*

**Richard N. Lambert**

*Assistant U.S. Attorney (retired)*

### **Media Parties**

**Deseret News**

**Salt Lake Tribune**

**Associated Press**

**Utah Headliners Chapter of the Society of**

**Professional Journalists**

**Utah Press Association**

### **Counsel for Media Parties**

**Michael P. O'Brien**

*Jones, Waldo, Holbrook & McDonough*

**Ryan M. Harris**

*Jones, Waldo, Holbrook & McDonough*

**Shane J. Shumway**

*Jones, Waldo, Holbrook & McDonough*

### **Expert Witnesses**

**Dr. Paul D. Whitehead, M.D.**

*Utah State Hospital*

**Dr. Richard DeMier, Ph.D**

*Clinical Psychologist, Springfield, MO*

**Dr. Daniel C. Peterson, Ph.D**

*Professor of Islamic Studies,  
Brigham Young University*

**Dr. Noel C. Gardner, M.D. MDiv**

*Adjunct Professor of Psychiatry,  
University of Utah*

**Dr. Michael Welner, M.D.**

*Forensic Psychiatrist*

**Dr. Stephen L. Golding, Ph.D**

*Emeritus Professor of Psychology,  
University of Utah*

**Dr. Jennifer Skeem, Ph.D**

*Forensic Psychologist*

### **Counsel for Brian David Mitchell**

**Robert L. Steele**

*Assistant Federal Defender*

**Parker Douglas**

*Assistant Federal Defender*

**Wendy M. Lewis**

*Assistant Federal Defender*

**Audrey K. James**

*Research and Writing Attorney,  
Utah Federal Defender Office*

### **Counsel for Wanda Eileen Barzee**

**Scott C. Williams**

*Scott C. Williams, LLC*

### **Key Witnesses**

**Elizabeth Ann Smart**

*Victim*

**Lois Smart**

*Mother of Elizabeth Smart*

**Mary Katherine Smart**

*Sister of Elizabeth Smart*

**George Dougherty**

*Agent, Federal Bureau of Investigation*

**Heidi Woodridge, LouRee Gaylor**

*Step-Daughters of Brian David Mitchell*

**Wanda Eileen Barzee**

*Wife, Co-Defendant of Brian David Mitchell*

**Dr. Randal A. Oster, Ph.D**

*Psychologist*

**Paul Mechum**

*Former LDS Stake President*

**Doug Larsen**

*Former OC Tanner co-worker of Brian David Mitchell*

**Lisa Holbrook, Kayleen Hill, Tim Mitchell**

*Siblings of Brian David Mitchell*

**Shirl and Irene Mitchell**

*Parents of Brian David Mitchell*

**Scott Dean**

*Former brother-in-law of Brian David Mitchell*

**Karl and Benjamin West**

*Members of lymphology group*

**Alyssa Phillips**

*Former member of lymphology group*

**Julie Adkinson**

*Mail employee, refused invitation to become  
polygamist wife of Brian David Mitchell*

**Robert Rendell**

*Salt Lake City Police Department*

**Jon Richey**

*Salt Lake County Sheriff's Office*

**Jeremy Clarke**

*Former LDS missionary in San Diego, CA*

**David Lamb**

*Defense attorney for Brian David Mitchell, San Diego,  
CA*

**Troy Rasmussen**

*Arresting officer, former Sandy PD, current  
Cottonwood Heights officer*

**Gregory Porter**

*Social worker, Utah State Hospital*

**Leslie Miles**

*Nurse, Utah State Hospital*

## **FAIR TRIAL / PUBLIC ACCESS ISSUES DURING MITCHELL TRIAL**

1. Access to Court Records/Proceedings
  - Competency hearing exhibits (e.g. psychological reports and videotapes)
  - Sealed motions and legal memoranda and documents
  - Sealed docket entries
  - Closed/in camera hearing
2. Preserving Right to a Fair Trial
  - Motion to change venue
  - Delayed release of pretrial exhibits
  - Stipulated “gag order” on counsel and experts re: comments on non-public matters
3. Jury Selection and Juror Privacy
  - Expanded jury venire
  - Written juror questionnaire
  - Access to juror questionnaire
  - Access to individual voir dire
  - Court sidebars
4. Trial Logistics
  - Decorum order
  - Pool reporting
  - Overflow room
  - Release of exhibits and videotape
  - Electronic reporting within courthouse
5. Post Trial Juror Access
  - Organized courthouse juror group interviews

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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH**

**CENTRAL DIVISION**

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**UNITED STATES OF AMERICA,**

Plaintiff,

v.

**BRIAN DAVID MITCHELL, et al.,**

Defendants.

**ORDER**

**Case No. 2:08CR125DAK**

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This matter is before the court on the Government's Motion to Unseal Defendant's Motion for Sanctions. The premise for the government's motion is that Defendant's Motion for Sanctions was improperly filed under seal without first seeking a court order making on-the-record findings justifying closure.

Given both parties' practice in this case of contacting the court and seeking informal in-chambers conferences regarding various procedural matters, Defendant's counsel contacted the court seeking an in-chambers meeting regarding the government's alleged release of confidential information to the media. Defendant's counsel stated that he believed that the release of information was in violation of the court's August 11, 2009 Order limiting the release of non-public information. The court responded that the matter appeared to raise substantive legal issues and should be dealt with on the record. The court requested that Defendant's counsel file a motion on the matter. Because the question involved the propriety of releasing allegedly confidential information to the press, the court specifically requested Defendant's counsel to file

the motion under seal.

After directing Defendant's counsel to file his motion under seal, the court denies the Government's Motion to Unseal Defendant's Motion for Sanctions at this time. The court, however, recognizes the importance of the legal issues raised in the government's motion regarding whether documents have been improperly filed under seal. The court agrees with the government's position that the parties have not properly put before the court the basis for sealing documents. Rather, they have selectively chosen to file documents under seal without a court order. Because the parties have not previously briefed or addressed issues with respect to the basis for sealing documents, the court believes these legal issues require full briefing by the parties.

Specifically, the court requests the parties to address the basis or rationale for filing documents relating to the competency hearing under seal. The court notes that it finds it a peculiar situation where documents pertaining to certain motions are being filed under seal when the parties are not requesting the court to seal the hearing on those motions. Moreover, the court's August 11, 2009 Order approving the parties' Stipulation and Agreement refers to the dissemination of non-public information and recognizes that information in public hearings and publicly filed documents is considered public information. But, the Stipulation and Agreement does not address the underlying issue of what information with respect to the competency hearing should be in the public domain and what information should be filed under seal.

The issue of whether documents relating to a defendant's competency to stand trial should be, and to what extent they should be, under seal is not precisely clear from the court's initial review of the applicable statutes and Tenth Circuit case law. Under the statutes providing

for the mental examination of a defendant to determine competency to stand trial, 18 U.S.C. § 4241 and 18 U.S.C. § 4247, there is no stated right of privacy for the resulting psychiatric or psychological reports.<sup>1</sup> But, in *United States v. Mercado*, 165 Fed. Appx. 641 (10<sup>th</sup> Cir. 2006), when a district court unsealed psychological records based on the lack of a privacy right under the statutes, the Tenth Circuit remanded the issue to the trial court because “the district court may have acted precipitously in unsealing the report completely.” *Id.* at 643. The Tenth Circuit recognized that “psychological records . . . can be sensitive documents that not uncommonly are protected from public disclosure.” *Id.* Therefore, the court reversed the district court’s decision to unseal the forensic neuropsychological report and remanded the issue to the district court to further consider “to what degree the report should be protected from disclosure to anyone other than the BOP and its employees.” *Id.* at 643-44.

Given the Tenth Circuit’s ruling in *Mercado*, the court requests that the parties in this case specifically address the issue of what portions of documents require protection from disclosure. In a case such as this, where there are competing interests with respect to allowing public access to the proceedings and protecting sensitive medical information, the court must determine where to appropriately draw the line. To date, the parties have filed entire briefs under seal, rather than specifically addressing what portions of information should be redacted and filed under seal in an otherwise publicly filed document. While the court recognizes that a determination with respect to sealing a document or portions of a document should be made on a

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<sup>1</sup> Under Federal Rule of Criminal Procedure 12.2(c)(2), a mental examination report made pursuant to Federal Rule of Criminal Procedure 12.2(c)(1) must be sealed unless the defendant is found guilty of a capital crime and confirms an intent to present evidence as to his mental condition. The Advisory Committee Notes to Rule 12, however, specifically states that the rule does not deal with the issue of mental competency to stand trial.

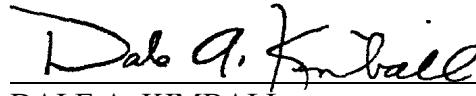
document-by-document basis, to the extent that the court and parties can construct a standing order regarding certain confidential matters, the court believes such an order would be beneficial. *See United States v. McVeigh*, 119 F.3d 806, 813 (10<sup>th</sup> Cir. 1997) (“A high-profile case such as this imposes unique demands on the trial court, and requires the court to establish procedures for dealing effectively, efficiently, and fairly with recurring issues such as whether documents should be placed under seal or redacted.”).

Because the case, and more specifically matters relating to the competency hearing, involve sensitive medical reports, the court believes it is necessary to consider these issues under seal until it can appropriately determine what information relating to the competency hearing can be in the public domain. The court acknowledges that court proceedings are typically presumed to be public, but in this limited context involving competency matters, the court concludes that it must proceed on these issues under seal in order to protect Defendant from suffering any potential prejudice. Moreover, Defendant has moved to exclude from the competency hearing the report and testimony of Dr. Welner. The Tenth Circuit has recognized that the media’s right of access “does not extend to the evidence actually ruled inadmissible.” *Id.* (citing *United States v. Gurney*, 558 F.2d 1202, 1210 (50<sup>th</sup> Cir. 1977) (“The press has no right of access to exhibits produced under subpoena and not yet admitted into evidence, hence not yet in the public domain.”)).

The court directs the parties to file cross briefs regarding the issues relating to the propriety of sealing certain matters regarding the competency hearing by October 20, 2009. The parties shall then file reply memoranda to the opposing party’s brief by October 26, 2009. The government shall also file an opposition to Defendant’s Motion for Sanctions by October 21,

2009, and Defendant shall file a reply by October 27, 2009. The court will hold a sealed hearing on these matters on Friday, October 30, at 1:30 p.m.

DATED this 13th day of October, 2009.

A handwritten signature in black ink, reading "Dale A. Kimball", written over a horizontal line.

DALE A. KIMBALL  
United States District Judge

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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH**

**CENTRAL DIVISION**

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**UNITED STATES OF AMERICA,**

Plaintiff,

v.

**BRIAN DAVID MITCHELL, et al.,**

Defendants.

**ORDER**

**Case No. 2:08CR125DAK**

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On October 19, 2009, several media organizations filed a Motion for Limited Intervention and Request for Notice of Motions to Close or Seal Judicial Proceedings or Records. The parties in this case have until November 6, 2009, to file oppositions to this motion. The motion, therefore, will not be fully briefed and ripe for decision prior to this court's scheduled October 30, 2009 hearing regarding the propriety of sealing documents in this case. Because part of the relief sought by the media organizations is the ability to participate in the October 30, 2009 hearing, the court enters the following order.

On October 19, 2009, the media organizations also filed a Motion to Keep Hearings Open, Unseal Court Records, and Disclose Secret Docket Entries. The court will consider this motion, and the arguments and analysis therein, in relation to the matters before the court at the October 30, 2009 hearing. The court, notes, however, that the first section of the Motion to Keep Hearings Open, Unseal Court records, and Disclose Secret Docket Entries regarding open hearings largely focuses on issues irrelevant to those pending before the court. No party has

sought to close any portion of the competency hearing. In addition, no party has sought to argue any pre-competency hearing evidentiary motion in a sealed proceeding.

The court can understand the media organization's confusion regarding the upcoming hearings on the pending motions. This confusion not only stems from the fact that entire motions have been filed under seal, but because the docket entries for the sealed documents themselves have been sealed from public view in the public docket. Until the media organizations filed their motions with the court, the court was unaware that the docket entries were sealed as well as the documents. The court's version of the docket, available to chamber's staff, does not allow it to know whether the public version shows the sealed docket entries. The court finds no basis for sealing the docket entries. Therefore, the court requests in this order that the clerk's office unseal all sealed docket entries in the docket.

The court also believes that there may be confusion from the docket as to the nature of the court's upcoming hearings. The court's October 30, 2009 hearing will focus on the Defendant's sealed motion for sanctions and the propriety of sealing documents and particular information within documents. The court's November 9, 2009 hearing will be argument on the remaining portion of Defendant's "Motion to Preclude the Introduction of All Lay Witness Testimony as Irrelevant, Unfairly Prejudicial, and Cumulative,"<sup>1</sup> Defendant's "Motion to Exclude Writings by Ervil LeBaron and Expert Testimony by Richard Forbes and Daniel Peterson," and Defendant's "Motion to Exclude Testimony of Dr. Michael Welner." The actual competency hearing is set for two weeks beginning November 30, 2009.

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<sup>1</sup> The court already heard argument on and ruled on the portion of this motion dealing with the testimony of the victim, Elizabeth Smart.

The court's October 13, 2009 Order did not deal with sealing hearings on evidentiary matters or sealing the competency hearing. Rather, the Order specifically noted that all such hearings will be open to the public. The court's order questioned why entire motions and supporting memoranda have been filed under seal when the hearings on those motions will not be sealed. The only issue presently before the court with respect to sealing matters relating to the competency hearing deals with documents. The media organizations concern regarding sealed hearings, therefore, can only relate to the court's October 30, 2009 hearing which is presently set to be a sealed hearing.

As the court expressed in its October 13, 2009 Order, the court set the October 30, 2009 hearing to be sealed because it wanted the parties to have the freedom to proffer specific information that may be contained in motions, reports, and other exhibits relevant to the competency hearing that they believe needs to remain under seal. The basis for keeping such information under seal would be that the information would be prejudicial to the Defendant, the victim, or other third parties if it is disclosed. If the court were to fully open the hearing and allow the media to report on every piece of evidence, admitted or not, that the parties believe would be prejudicial to Defendants right to a fair jury or invade the privacy rights of sexual abuse victims and other third parties, the court would need to find an absolute right of access. No such absolute right exists.

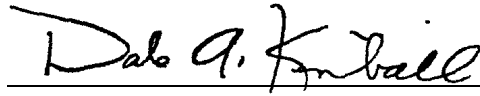
In their motions, the media organizations pointed this court to the ruling in Mitchell's state court proceedings regarding access to the competency hearing. The order is largely irrelevant because nobody in this case has suggested that any part of the competency hearing should be sealed. The court, however, notes that Judge Atherton acknowledges in her order that

she conducted *in camera* hearings during which she allowed the parties to proffer evidence that they believed would create a substantial probability of prejudice. As explained in the Court's October 13, 2009 Order, this court's October 30, 2009 hearing was set as a sealed hearing for the same purpose.

Nonetheless, given the parties' submissions on the sealing issue, and the apparent ability of the parties to address most, if not all, of the issues in general terms, the court believes that a majority, if not all, of the October 30, 2009 hearing can be open to the public and media. The court, however, will allow the parties to request that a portion of the hearing be sealed if they wish to identify to the court specific information that they believe would cause a likelihood of prejudice if it is unsealed. The court finds no basis for sealing the argument on Defendant's Motion for Sanctions. The propriety or impropriety of the conduct of the United States' attorney's office can be discussed publicly. Again, the only basis for sealing a portion of the hearing is to allow the parties to identify to the court specific information contained in psychological reports and other court filings that may prejudice Defendant's rights to a fair trial, the privacy rights of the victim and other alleged abuse victims, and the identities of other patients at the Utah State Hospital. If such information can be presented in a general manner, no portion of the October 30, 2009 hearing will be sealed.

Even though the motion to intervene is not ripe for decision, the court will allow the media organizations seeking to become intervenors to participate in the public portion of the October 30, 2009 hearing by presenting a ten-minute argument. The court will also allow these media organizations to file a response to the parties' briefs on the sealing issue no later than noon on October 28, 2009.

DATED this 26<sup>th</sup> day of October, 2009.

A handwritten signature in black ink, reading "Dale A. Kimball". The signature is written in a cursive style with a horizontal line underneath it.

DALE A. KIMBALL  
United States District Judge

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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH**  
**CENTRAL DIVISION**

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**UNITED STATES OF AMERICA,**

Plaintiff,

v.

**BRIAN DAVID MITCHELL, et al.,**

Defendants.

**ORDER**

**Case No. 2:08CR125DAK**

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On February 5, 2010, the Salt Lake Tribune sent a letter to this court's Clerk of Court requesting copies of video clips played during the recent competency hearing for Defendant Brian David Mitchell. On February 23, 2010, ABC News sent a letter to the court by electronic mail requesting copies of all the videotapes shown at the competency hearing and several documentary exhibits. The court forwarded these requests to the parties and requested an informal response regarding media access. When the parties' informal responses appeared to conflict and counsel for the Salt Lake Tribune requested an opportunity to file a memorandum on the issue, the court requested that the parties and media outlets to file more formal briefing on the issue by March 5, 2010. Both the government and Defendant filed responses.<sup>1</sup> Counsel for

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<sup>1</sup> Counsel for Defendant stated that the court requested them to respond to "purported press inquiries and requests for materials and exhibits." The court forwarded the media's written requests for copies of exhibits to defense counsel. Thus it is unclear to the court why defense counsel would refer to the written media requests as "purported." The fact that the requests were not entered into the court's docket does not make them "purported." The court must still address the issues raised by the requests and determine the proper response.

the Salt Lake Tribune, however, notified the court that although his client believes it is entitled to copies of the court's exhibits, it decided not to file a brief on the issue because it concluded that it would not impact its coverage of the story. ABC News also notified the court that while it is interested in the court's decision on the subject, it intended to merely monitor what others filed. Despite the media outlets' decisions not to brief the issue regarding their right to access, the court believes that the parties to the case have thoroughly addressed the issue presented by the media outlets' requests.

The court has already declined to allow access to mental health reports until such time as those materials were relied on by the court and are redacted by counsel. The court's decision on Defendant's competency relied on those reports, and the court has been informed by counsel that they are in the process of redacting the materials. The crux of the media requests for exhibits, therefore, is whether they are entitled to physical copies of the videos shown at the public competency hearing. The videotapes at issue are: (1) Government Exhibit 16, Mitchell's initial interview with law enforcement after his capture on March 12, 2003; (2) Government Exhibit 17 and Defense Exhibit A, Wanda Barzee's interview with Dr. Michael Welner; (3) Government Exhibit 18, Mitchell's court appearance in San Diego, California; (4) Government Exhibit 31, Mitchell's interview with Dr. Welner; and (5) Government Exhibit 33, Mitchell's interviews with Dr. Richert DeMeir. While the media outlets did not specifically limit their requests to the portions of those videotapes that were shown in open court, it is the court's understanding that they are not seeking more access than the public had at the competency hearing.

The government's response recognizes the media's right to access the video clips shown at the competency hearing but expresses concern that physical access to the videotapes presents

substantial problems in the pretrial context. Defense counsel's main concern focuses on their client's due process rights to a trial by an impartial jury. Given the media's ability to view the videotapes in the public competency hearing and to report on what was seen, the government proposes that the media be allowed similar post-hearing access through viewing the videotapes in the courthouse rather than actual physical access to copies of the videos. Defense counsel question the legality of the government's proposal, but agree with the due process concerns presented by the potential of excessive or prejudicial publicity.<sup>2</sup> Defense counsel state that they

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<sup>2</sup> Defense counsel state in their introduction that "any sensationalism regarding this case has long since occurred." While the events associated with Defendant's alleged crime received significant publicity in the past, the court does not believe that any sensationalism has occurred as a result of the court proceedings or the conduct of any of the attorneys in this case. Defense counsel takes issue with the court's recent decision on competency, stating that the court was "wide ranging rather than circumspect in the findings it found 'essential' to the competency ruling." The court explained in its decision on competency that Defendant's refusal to participate in the evaluation process and the conflicting expert opinions required the court to fully analyze the facts relevant to the issue. For example, the court was presented with a mental health expert who diagnosed Defendant with schizophrenia, citing no cultural explanation for his allegedly delusional beliefs. Even in response to questions regarding the evidence of Defendant's cultural influences that had been presented at the hearing, the expert did not consider it necessary to reevaluate his analysis of the issue. The court, however, believed that Defendant's cultural influences were essential to an understanding of his mental condition. The court, therefore, was required to explain those facts it felt essential to its determination that the expert's analysis should be discounted. The court was also presented with evidence that the state court judge, who found Defendant incompetent, was presented with an incomplete historical narrative that appeared to demonstrate a psychotic break when Defendant became homeless and potentially another when plea negotiations broke down with state prosecutors. The court, therefore, was required to explain the facts it deemed essential to an understanding of its determination that no psychotic break occurred. The issue of competency is highly fact intensive, and the court has an obligation to explain the basis for its decision. Despite the court's decision, the media coverage of the decision has done little more than make a reference to the fact that it was a lengthy decision and then recite the court's ultimate findings with respect to the *Dusky* standards. Most of the press coverage included one or two of the court's specific findings and then also included quotes from defense counsel as to their disagreement with the court's decision and their belief that Defendant is extremely mentally ill. The court has monitored the press coverage of the decision and has found nothing, to date, that is unduly prejudicial to Defendant.

support any measures the court finds appropriate to protect their client's due process rights.

### **DISCUSSION**

The Tenth Circuit Court of Appeals has recognized that a “high-profile case such as this imposes unique demands on the trial court, and requires the trial court to establish procedures for dealing effectively, efficiently, and fairly with recurring issues” involving the balancing of the accused's due process rights and the public's access to information. *United States v. McVeigh*, 119 F.3d 806, 813 (10<sup>th</sup> Cir. 1997). “There is not yet any definitive Supreme Court ruling on whether there is a constitutional right of access to court documents and, if so, the scope of such a right.” *Id.* at 812. It is, however, “clearly established that court documents are covered by a common law right of access.” *Id.* at 811.

#### A. First Amendment

The “First Amendment protects the right of the public and the press to attend criminal trials” and pretrial proceedings. *Id.* While a number of circuit courts have applied this First Amendment right to attend proceedings to the right to access court documents, “it is uncertain whether the Tenth Circuit would apply the First Amendment standards . . . or the common law standard . . . to a media request for access to court documents, where as here the press was present at the hearings involving those documents.” *Id.*

In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1979), various media outlets sought to copy audio tapes admitted into evidence at the Watergate criminal trial. *Id.* at 591. In response to the media's contention that *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469 (1975), provided the media with a First Amendment right to copy and publish materials displayed in open court, the *Nixon* Court stated that *Cox* provided nothing more than an affirmation of the

media's right "to publish accurately information contained in court records open to the public."

*Nixon*, 435 U.S. at 608-09. The *Nixon* Court then explained why the First Amendment was not implicated in that case:

there is no claim that the press was precluded from publishing or utilizing as it saw fit the testimony and exhibits filed in evidence. There simply were no restrictions upon press access to, or publication of any information in the public domain. Indeed, the press-including reporters of the electronic media-was permitted to listen to the tapes and report on what was heard. Reporters also were furnished transcripts of the tapes, which they were free to comment upon and publish. The contents of the tapes were given wide publicity by all elements of the media. There is no question of a truncated flow of information to the public. Thus, the issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes-to which the public has never had physical access-must be made available for copying.

*Id.* at 609.

The Sixth Circuit has noted that the *Nixon* Court indicated in this passage that there is clearly "a difference between an opportunity to hear the tapes and access to the tapes themselves." *United States v. Beckham*, 789 F.2d 401, 409 (6th Cir. 1986). Similarly, the Tenth Circuit explained that "*Nixon* did not hold that there is no First Amendment right to access court documents. Rather, the Court there merely held that, in a situation where there 'was no question of a truncated flow of information to the public,' there was no right to physically access and copy the Watergate tapes that had already been played in open court where transcripts of the tapes were available to the media and the public generally." *United States v. McVeigh*, 119 F.3d 806, 812 (10th Cir. 1997) (quoting *Nixon*, 435 U.S. at 609).

Following *Nixon*, other circuit courts have held that there is no First Amendment right to

copy and publish recordings played in open court where the media could hear and report on the contents. In *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 426 -27 (5th Cir. 1981), the Fifth Circuit held that there is no First Amendment right to copy and publish tapes admitted into evidence where “[m]embers of the press were allowed to listen as the tapes were played in court; transcripts were prepared and distributed for their use; reporters and broadcasters were free to report this information as they wished.” And, in *Beckham*, already cited, the Sixth Circuit held that the media had no First Amendment right to copy tape recordings admitted at trial where “there were no restrictions on media access to the trial or on the publication of information in the public domain.” 789 F.2d at 409.

As in *Nixon*, the First Amendment right to access is not implicated in this case because there is “no question of a truncated flow of information to the public.” 435 U.S. at 609. The videotapes in question were played in an open and public court proceeding. During the course of the competency hearing, the public and press had the opportunity to view the evidence, and the press was free to report on the content of the videotapes. See *Beckham*, 789 F.2d at 415. In fact, this court went “to great lengths to facilitate access to the trial proceedings by, for example, reserving seats in the courtroom for members of the press and providing an overflow room for remote viewing.” *In re Providence Journal*, 293 F.3d 1, 16 (1st Cir. 2002.) “By affording interested members of the media ample opportunity to see and hear the tapes as they are played for the jury, the court has fulfilled its pertinent First Amendment obligations.” *Id.*

In this case, not only has the press and public had an opportunity to witness the materials in open court proceedings, the government’s proposal with respect to the videos played at the competency hearing would allow similar post-hearing access. The proposal allows members of

the press to make arrangements with the Clerk of Court to review the materials at the courthouse and report on them. The court, therefore, concludes that the First Amendment is not implicated by the degree of access allowed.

#### B. Common Law Right of Access

Assuming that the common law right of access applies, the *Nixon* Court recognized that “the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files.” *Nixon*, 435 U.S. at 598. The court agreed with prior cases “that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.” *Id.* at 599.

The *Nixon* Court noted that “[i]t is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common law right of access or to identify all the factors to be weighed in determining whether access is appropriate.” *Id.* at 598-99. Since *Nixon*, however, the Tenth Circuit has stated that under the common law right of access, “judicial documents are presumptively available to the public, but may be sealed if the right to access is outweighed by the interests favoring nondisclosure.” *United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997). “The party seeking to overcome the presumption bears the burden of showing some significant interest that outweighs the presumption.” *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007) (quoting *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)).

Citing to the Tenth Circuit’s decision in *McVeigh*, another district court recognized that “judicial documents are presumptively available to the public,” but also identified several “countervailing factors favoring nondisclosure.” *United States v. Salemm*, 985 F. Supp. 193,

195 (D. Mass. 1997). These factors include: “(i) prejudicial pretrial publicity; (ii) the danger of impairing law enforcement or judicial efficiency; and (iii) the privacy interests of third parties.” *Id.* (citing *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995); *McVeigh*, 119 F.3d at 813-14; *In re Globe Newspaper Co.*, 729 F.2d 47, 59 (1<sup>st</sup> Cir. 1984). The court concludes that these countervailing factors favor nondisclosure of physical copies of the videos in the present case.

#### (1) Pretrial Publicity

In contrast to the present case and the court’s concerns about empaneling a jury, the circuit court opinions addressing the right to copy audio or video tape evidence in a criminal case involve exhibits admitted at trial. Many of these cases are factually distinguishable because they rightly are not concerned with empaneling an unbiased jury. The government cites to cases, however, where additional pending charges against the defendant or against other co-defendants raised jury venire concerns. In those circumstances, the courts recognized that the risk of prejudice to a fair trial was the most compelling reason to deny the right to copy audio and video tape exhibits for subsequent broadcast.

For example, in *United States v. Belo*, 654 F.2d 423 (5th Cir. 1981), the Fifth Circuit affirmed the district court’s decision to deny media requests to copy and broadcast audiotapes admitted as evidence at trial. In denying the requested access, “the district judge made clear his concern that broadcast of the tapes outside his courtroom would have a deleterious effect on the pending trial of defendant Moore.” *Id.* at 425. In his memorandum opinion, the judge wrote, “Widespread publication of these tapes prior to trial will severely prejudice Mr. Moore’s sixth amendment right to a fair trial, as well as potentially deny him rights guaranteed by the fourth

and fifth amendments. Moreover, if the tapes are prematurely heard by the public, this court would be severely hampered in selecting a fair and impartial jury in the forthcoming trial.” *Id.*

On appeal, the Fifth Circuit held that the district judge did not abuse his discretion in denying the broadcasters physical access to the tapes. “The judge’s concern was with the rights of a yet-to-be tried defendant; the provision to a defendant of a fair trial is a reasonable and necessary concern of the presiding judge.” *Id.* at 431. Unlike the situation where a case is on appeal and the chance of a retrial is remote, the postponed trial of the co-defendant was “not of a ‘hypothetical’ nature.” *Id.* Although the trial court had no difficulty selecting a jury for the first trial, it was unclear what effect “media access to and rebroadcast of the tapes could have.” *Id.* at 432. Significantly, the Fifth Circuit noted that the “choice” was “between an undeniably important but nonconstitutional right of physical access to courtroom exhibits and a defendant’s due process right to a fair trial, ‘the linchpin of our criminal justice system.’” *Id.* (quoting *United States v. Criden*, 648 F.2d 814, 827 (3d Cir. 1981)).

In *United States v. Webbe*, 791 F.2d 103 (8th Cir. 1986), the Eighth Circuit also affirmed the district court’s denial of a media request to copy tapes admitted into evidence in a criminal trial. *Id.* at 105. The Eighth Circuit found that the district court judge properly considered a number of factors in denying the application to copy the tapes. *Id.* at 106. One of these factors included “concern that defendant Webbe’s right to a fair trial under the Sixth Amendment to the Constitution would be affected by release of the tapes,” given that one trial was currently underway and Webbe had two other pending charges in which the tapes might also be used. *Id.* The court was “satisfied that the district court properly considered the relevant factors” and found “no abuse of discretion in the court’s determination here that Webbe’s constitutional right

to a fair trial outweighs CBS' common law right of access to the tapes." *Id.* at 107.

In *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982), the Seventh Circuit affirmed the district court's refusal to release copies of an audio recording admitted into evidence and played in open court during a criminal trial. In part, the district court's refusal relied on the fact that the defendant "had yet to stand trial upon several counts of tax evasion that had been severed from the instant charges and that public broadcast of the tape might make it 'doubly difficult' to draw a jury for that subsequent proceeding." *Id.* at 1291. On appeal, the Seventh Circuit noted, "Where there is a clash between the common law right of access and a defendant's constitutional right to a fair trial, a court may deny access, but only on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture." *Id.* at 1294. The pending charges made a trial "more than merely hypothetical," however, and the "trial judge properly recognized that adverse publicity arising from broadcast of the tape, which clearly implicated Edwards in the extortion scheme, posed a threat to drawing a fair and impartial second jury." *Id.*

Similarly, the prospect of a trial in this case not merely a remote possibility. *Cf. In re National Broadcasting Co.*, 653 F.2d 609, 618 (D.C. Cir. 1981) (reversing denial of access to audio and videotapes in part because "the interest in avoiding the risk of potential prejudice at a hypothetical second trial is seldom of sufficient weight to justify denying access to judicial records which have been displayed in open court"). This court's ruling that Mitchell is competent to stand trial means that a trial is imminent.

As in the cases cited above, there is a significant risk that the broadcast of the tapes will prejudice the upcoming trial. Media coverage of the court's determination on competency has

subsided. However, releasing copies of the videotapes will certainly result in additional pre-trial publicity that carries with it the potential for prejudicing Defendant's right to a fair trial. Moreover, videotapes can be widely broadcast and rebroadcast, edited, and taken out of context. Even though the information contained on the tapes has been extensively reported in the press, viewing the videos firsthand is far more likely to make a longstanding impression that potential jurors may find more difficult to set aside. *See Myers*, 635 F.2d at 953 (noting that "seeing the tapes on television will create a stronger impression of the events among those who have already been exposed to news accounts of their contents"). The exhibits in this case portray Defendant in an unflattering light and "[t]elevison indubitably has a much greater potential impact on jurors than print media." *In re NBC Universal*, 426 F. Supp. 2d 49, 58 (E.D.N.Y. 2006).

Furthermore, the court agrees with the government that other procedural devices – such as voir dire, cautionary instructions, jury sequestration, or change of venue – are poorly suited to protect Defendant's right to a fair trial against the additional publicity that will result from release of the videotapes. *See Beckham*, 789 F.2d at 415 (affirming district court's determination that the dangers to the defendant's right to a fair trial could not be adequately protected through jury sequestration, voir dire and cautionary instructions); *Belo*, 654 F.2d at 432 (refusing to "second guess the trial judge on the relative costs and benefits to the efficient administration of justice of such protective measures" as "searching voir dire examination of potential jurors; empaneling a larger body of veniremen; and change of venue").

Because an impartial jury has not yet been impaneled, this court cannot guard against prejudicial publicity either by sequestering the jury or by issuing cautionary instructions to avoid media reports. Given the extensive pretrial publicity already associated with this case, the

selection of a fair and impartial jury will already require a large venire, a juror questionnaire, and lengthy voir dire. The additional publicity created by releasing copies of the videotapes will pose a further challenge to this court's ability to impanel a jury.

A continuance in this case to allow for any resulting publicity to subside is also an untenable option given the delay already experienced in bringing Defendant to trial. Finally, a change of venue would be inadequate given the national publicity associated with this case and the expressed desire of national news media to obtain copies of the videotapes for broadcasting.

The "trial judge has primary responsibility to provide the fair trial that the Constitution guarantees." *Beckham*, 789 F.2d at 415. At this pretrial stage, the release of videotapes for broadcasting, and potential re-broadcasting by less reputable outlets, presents an unacceptable risk to the court's ability to impanel an impartial jury and to ensure that the ultimate verdict is based solely on the evidence presented in court. The government's proposal of allowing the press access to view the videos and report on the contents is a superior alternative. The court relied on the videos in making its competency determination, the contents of the videotapes are detailed in the court's public decision, and the media can view the videos and report whether it agrees with the court's characterization of the videos. A nation-wide broadcast of the videotapes is unlikely to add appreciably to the public understanding of the issues than it is to merely appeal to more prurient interest in the case. While releasing copies of the videos may have some marginal value in furthering the public's understanding of the competency proceedings and the basis for the court's ruling, the media can fulfill its role in that respect through viewing the videotapes and doing its own reporting on their content. The court concludes that the presumption in favor of public access is outweighed by the significant interests in safeguarding

Defendant's right to a fair trial.

(2) Efficiency of Justice

The present case is proceeding to trial after a significant delay in the state court and the necessity of addressing Defendant's competency at the outset of this federal prosecution.

Defense counsel mention in their response that they have repeatedly voiced concerns over pre-trial publicity. Such concerns are only hurt by delay. Given the public interest in this case, the court believes that both it and the parties have proceeded thus far without any undue publicity.

The court, however, has significant concerns regarding the release of unflattering videos to a national audience on the eve of trial. As stated above, the release of the videos could result in potential delays, such as a request to change the trial's venue or a request for a continuance to allow for any resulting publicity to subside. Neither of these alternative, however, would address the underlying problem of the potential publicity generated by a release of the videos.

And, they would cause further delays which the court considers unacceptable.

(3) Privacy Interests

While the court believes that Defendant's due process rights at this pretrial stage sufficiently outweigh the media's right to physical copies of the videos, this case also presents privacy interests of the victim. The video of Dr. Welner interviewing Defendant includes a video of Elizabeth Smart being interviewed within days of being recovered. If copies of the video are released, the sensitive issues recorded on the videotapes and the traumatic events could remain in the public indefinitely. And, with modern technology, including editing software and sites such as YouTube, there is no limit to the number of times the videotapes could be distributed and viewed, the manner in which the contents could be manipulated, or the purposes

for which the recordings could be used.

Significantly, the victim in this case has a statutory “right to be treated with fairness and with respect for the victim’s dignity and privacy.” 18 U.S.C. § 3771(a)(8). The victim’s right to be treated with respect for her dignity and privacy would be ill-served by the release and subsequent broadcast of videotapes that detail her sexual abuse. *See United States v. Shuie*, 504 F. Supp. 360, 363-64 (D. Minn. 1980) (refusing to release copies of videotape exhibits based on large part on victim’s privacy interests). The court “has a responsibility to exercise an informed discretion as to release of the tapes, with a sensitive appreciation of the circumstances that led to their production.” *Nixon*, 435 U.S. at 603. The Supreme Court has recognized that the common law right of inspection has been limited in “the painful and sometimes disgusting details of a divorce case.” *Id.* at 598. Certainly, the common law right to access must be limited in situations involving the alleged sexual abuse of a minor. In a case involving allegations of the sexual abuse of a minor, the court agrees with the government that there is a risk that broadcast and potentially re-broadcasts of the videos could essentially amount to revictimization. The court, therefore, concludes that the significant privacy concerns of the victim and the victim’s statutory right to have her privacy respected outweigh the media’s right to a physical copy of the videos.

(4) Substantial Access

In addition to the above factors weighing against the court’s release of the videos, the *Nixon* Court recognized that “the fact that substantial access already has been accorded the press and public” is one factor to be weighed when balancing the common law right of access against other competing interests. 418 U.S. at 599 n.11. In this case, the media and the public have had

substantial access to the information contained on the videotapes. The videotapes were played in open court on a large screen visible to the members of the public and press in attendance. The media had the opportunity to view the videotapes, take notes, and fully report on their contents. *See United States v. McDougal*, 103 F.3d 651, 658 (8th Cir. 1996) (noting the fact that substantial access had already been afforded was a circumstance weighing against release of President Clinton's videotaped deposition played in court); *Webbe*, 791 F.2d at 106 (noting that district court properly considered the fact that the public had already been afforded substantial access to the information given that "the news media had attended the trial and pre-trial hearings, had reported the events of the trial to the public, and had received transcripts of the tapes").

Where, as here, "the right to make copies of tapes played in open court is essentially a request for a duplicate of information already made available to the public and the media, then the district court has far more discretion in balancing the factors." *Beckham*, 789 F.2d at 414-15. In this case, there are "sufficiently weighty reasons to justify the denial of permission to make copies of the tapes under the common law." *Id.* at 415.

The Eastern District of New York previously employed an approach similar to the government's proposal in order to protect the defendant's Sixth Amendment right to a fair trial untainted by exposure to irrelevant, prejudicial information. *In re NBC Universal*, 426 F. Supp. 2d 49, 52-53 (E.D.N.Y. 2006). The court allowed for inspection of audio-video recordings admitted into evidence by the government in support of its motion to disqualify defense counsel, but prohibited the reproduction and distribution of recordings based on the risk of prejudice caused by increased pretrial publicity. The court noted that its "restriction on public and media access to the audio-video recordings is minimal." *Id.* at 58. Because nothing was sealed, "[a]ny

member of the press or of the public may view the recordings, unredacted, upon request.” *Id.*

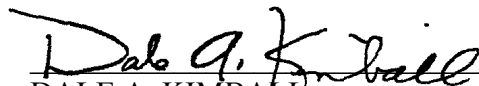
This court agrees that the appropriate balance is best struck by permitting public inspection of the videotapes and restricting only the right to obtain copies of the videos. This approach will satisfy the public’s interest in the opportunity to inspect exhibits admitted into evidence at a public hearing and the media’s desire to monitor the functioning of the court without implicating the substantial competing interests identified above. Under this approach, any member of the press or public desiring to inspect the videotape exhibits presented at the competency hearing are free to make arrangements with this court’s Clerk’s Office.

### CONCLUSION

For these reasons, the court concludes that the public’s presumptive right of access to physical copies of the videotapes played at Defendant’s competency hearing is outweighed at this pretrial stage by Defendant’s right to a fair trial and the privacy interests of the victim. Rather than deny access altogether, however, the court agrees with the government’s less restrictive proposal of permitting interested members of the media or public to make arrangements for viewing the exhibits at the courthouse. This approach does not limit all access, it only limits the form of access. The court concludes that, based on the circumstances presented in this case, this approach will best serve the interests of the public, the victim, and the parties.

Dated this 8<sup>th</sup> day of March, 2010.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Dale A. Kimball", is written over a horizontal line.

DALE A. KIMBALL,  
UNITED STATES DISTRICT JUDGE

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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH**

**CENTRAL DIVISION**

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**UNITED STATES OF AMERICA,**

Plaintiff,

v.

**BRIAN DAVID MITCHELL, et al.,**

Defendants.

**MEMORANDUM DECISION  
AND ORDER**

**Case No. 2:08CR125DAK**

**Judge Dale A. Kimball**

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This matter is before the court on Defendant Brian David Mitchell's Motion to Transfer Venue pursuant to the Fifth and Sixth Amendments to the United States Constitution, Rule 21(a) of the Federal Rules of Criminal Procedure, and the court's general supervisory powers. The court held a hearing on the motion on July 29, 2010. At the hearing, Plaintiff was represented by Diana Hagen, David Schwendiman, and Felice John Viti, and Defendant was represented by Parker Douglas, Robert L. Steele, and Audrey K. James. The court heard oral argument and took the motion under advisement. Having carefully considered the parties' memoranda submitted prior to the hearing and their arguments at the hearing, as well as the law and facts relevant to the motion, the court enters the following Memorandum Decision and Order.

**BACKGROUND**

On March 5, 2008, Defendant Brian David Mitchell was indicted in this court for allegedly kidnaping Ms. Elizabeth Smart in violation of 18 U.S.C. § 1201(a)(1) and unlawfully transporting her across state lines for improper purposes in violation of 18 U.S.C. § 2423(a). The

kidnaping is alleged to have occurred from June 5, 2002, until March 12, 2003.

The federal indictment against Mr. Mitchell was issued after several years of proceedings had occurred in Utah state courts. The Utah state court determined that Mr. Mitchell was not competent to stand trial and would not benefit from forced medication. This court, however, held its own competency hearing in December 2009 and found Mr. Mitchell competent to stand trial in a Memorandum Decision and Order, dated March 8, 2010.

Mr. Mitchell was indicted in this matter with a co-defendant, Ms. Wanda Barzee. Ms. Barzee, whose competency was restored through forced medication ordered by the Utah state court, pleaded guilty to the charges in the federal indictment on November 17, 2009. The court sentenced Ms. Barzee on May 21, 2010.

Mr. Mitchell's trial is scheduled to begin November 1, 2010. Mr. Mitchell, however, has now filed a motion to change the venue in which that trial should occur. In setting the trial date, the court and parties agreed to several pretrial deadlines, including a deadline of the preparation of an extensive pretrial juror questionnaire.

## **DISCUSSION**

Pursuant to the Fifth and Sixth Amendments to the United States Constitution and Rule 21(a) of the Federal Rules of Criminal Procedure, Defendant asks this court to transfer venue to another federal district based on allegedly prejudicial pretrial publicity and community investment in the outcome of the case in the District of Utah.

### **I. Legal Standard**

The United States Constitution provides that a criminal trial is to occur in the state where the crime has been committed. U.S. Const. Art. III, §2, cl. 3. The Sixth Amendment to the

United States Constitution also provides that criminal prosecutions shall occur in “the State and district wherein the crime shall have been committed.” U.S. Const. amend VI. But, the Sixth Amendment also grants the accused “[i]n all criminal prosecutions” the right to a trial by “an impartial jury.” *Id.* And the Fifth Amendment to the United States Constitution ensures that no person shall “be deprived life, liberty, or property, without due process of law.” *Id.* amend V. Accordingly, the “right to an impartial jury in the Sixth Amendment and the fundamental fairness requirement of the Due Process clause will override the place of trial provisions in both Article III and the Sixth Amendment in extraordinary cases.” *United States v. McVeigh*, 918 F. Supp. 1467, 1469 (W.D. Okla. 1996). The United States Supreme Court has specifically recognized that “[t]he Constitution’s place-of-trial prescriptions . . . do not impede transfer of the proceedings to a different district at the defendant’s request if extraordinary local prejudice will prevent a fair trial.” *United States v. Skilling*, 561 U.S. —, 130 S. Ct. 2896, 2913 (2010).

Federal Rule of Criminal Procedure 21 governs transfers of venue in federal criminal cases. Rule 21 instructs that, “[u]pon defendant’s motion, the court must transfer the proceeding . . . to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.” Fed. R. Crim. P. 21(a).

The parties agree that the constitutional standard for presumed prejudice is a heightened standard to that required under Rule 21. “[T]he bar facing the defendant wishing to prove presumed prejudice from pretrial publicity is extremely high.” *United States v. McVeigh*, 153 F.3d 1166, 1181 (10<sup>th</sup> Cir. 1998). “[T]o reach a presumption that inflammatory pretrial publicity so permeated the community as to render impossible the seating of an impartial jury, the court

must find that the publicity in essence displaced the judicial process, thereby denying the defendant his constitutional right to a fair trial.” *United States v. McVeigh*, 153 F.3d 1166, 1181 (10<sup>th</sup> Cir. 1998). Thus, “the claim of presumed prejudice is ‘rarely invoked and only in extreme situations.’” *Id.* (citations omitted).

Although Rule 21 adopts the constitutional guarantees of a fair and impartial trial, courts have recognized that the rule does not require a defendant to meet the same constitutional standards for a change of venue that a defendant must show in a post-conviction constitutional attack. *United States v. Marcello*, 280 F. Supp. 510, (E.D. La. 1968). It is a “well-settled rule that a motion for a change of venue” under Rule 21 “is directed to the sound discretion of the court.” *Id.* Rule 21 “is preventative. It is anticipatory. It is not solely curative as is a post-conviction constitutional attack.” *Id.* Thus, “it is the well-grounded fear that the defendant will not receive a fair and impartial trial which warrants the application of the rule.” *Id.*

In *Skilling*, the United States Supreme Court recognized that the discretion granted to trial courts under Rule 21 has been invoked “to move certain highly charged cases, for example the prosecution arising from the bombing of the Alfred P. Murrah Federal Office Building in Oklahoma City,” and “to deny venue-transfer requests in cases involving substantial pretrial publicity and community impact, for example, the prosecutions resulting from the 1993 World Trade Center bombing, and the prosecution of John Walker Lindh, referred to in the press as the American Taliban.” 130 S. Ct. at 2913 n.11 (citations omitted). Because *Skilling* did not argue that the district court abused its discretion under Rule 21, the *Skilling* decision addressed only whether the district court’s venue-transfer decision complied with the Constitution. *Id.*

Defendant, however, asserts that his case meets both the constitutional presumed

prejudice standard and Rule 21 standards for transfer of venue. The court, therefore, will address whether Defendant's case meets the constitutional standards for presumed prejudice and then whether Defendant's case should be transferred under Rule 21 standards.

## **II. Presumed Prejudice**

The recent Supreme Court decision in *United States v. Skilling*, 561 U.S. —, 130 S. Ct. 2896 (2010) guides this court's analysis of presumed prejudice. The *Skilling* Court addressed presumed prejudice because the Fifth Circuit Court of Appeals found presumed prejudice in the Southern District of Texas against Skilling based on the volume and tone of media coverage surrounding Enron's collapse, potential prejudice stemming from a co-defendant's guilty plea, and the large number of victims in the Houston area. *Id.* at 2911.

The Supreme Court began its analysis by asking: "When does the publicity attending conduct charged as criminal dim prospects that the trier can judge a case, as due process requires, impartially, unswayed by outside influence?" *Id.* at 2913. "Because most cases of consequence garner at least some pretrial publicity," the Court recognized that "courts have considered this question in diverse settings." *Id.* The Court then proceeded to discuss three cases in which convictions had been overturned because the "trial atmosphere . . . [was] utterly corrupted by press coverage." *Id.* at 2914. Nonetheless, the Court explained that these decisions "cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process." *Id.* "Prominence does not necessarily produce prejudice, and juror impartiality . . . does not require ignorance." *Id.* at 2914-15.

Noting that the standard for presumed prejudice "attends only the extreme case," the Court analyzed the issue by focusing on several factors relevant to a determination of presumed

prejudice. *See id.* at 2915-17. Those factors include: (1) “media interference with courtroom proceedings”; (2) the size and characteristics of the community in which the crime occurred”; (3) the nature and tone of the media publicity; (4) the amount of time that had elapsed between the crime and the trial; (5) the impact of the crime on the community; and (6) the effect of a co-defendant’s “well publicized decision to plead guilty.” *Id.* This court will analyze the same factors in determining whether presumed prejudice exists in the present case.

### *1. Media Interference With Proceedings*

The *Skilling* Court distinguished the cases of *Estes v. Texas*, 381 U.S. 532, 538 (1965) and *Sheppard v. Maxwell*, 384 U.S. 333 (1966) because both of those cases “involved media interference with courtroom proceedings during trial.” 130 S. Ct. at 2915 n.14. As in *Skilling*, there are no allegations in this case of media interference with courtroom proceedings during trial. While Defendant mentions one instance in which this court’s Decorum Order was breached by the *Salt Lake Tribune*, the breach was not prejudicial and did not interfere with courtroom proceedings. The breach involved the electronic transmission of witness testimony during the competency hearing. The transmission of the testimony was from an overflow media room, was in the form of a written transcript, and did not disrupt proceedings. Moreover, the same testimony was available to the public through certified transcripts by the next working day.

The media has undoubtedly been interested in covering the proceedings in this case, but the court has not sensed any kind of “carnival atmosphere.” While this court cannot speak to the atmosphere present in initial matters before the state court, the media presence during the federal court proceedings has been reserved and respectful. In no way can the media presence in this case be considered similar to the description of the atmosphere in *Sheppard*, where “bedlam

reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard.” 384 U.S. at 355.

This court’s Decorum Orders have precluded any member of the media from approaching Defendant, counsel, or witnesses inside the courthouse. Prior to hearings in this case, the court has repeatedly witnessed members of the public and media in the public gallery speaking with each other and then becoming silent when Defendant comes into the court. Defendant, therefore, has not been deprived of any of the solemnity and sobriety associated with the courtroom setting.

## 2. *Size and Characteristics of the Community*

The *Skilling* Court recognized that “the size and characteristics of the community in which the crime occurred” is relevant to a determination of presumed prejudice. 130 S. Ct. at 2915. The court distinguished the small parish of 150,000 residents in *Rideau v. Louisiana*, 373 U.S. 723 (1963), with the 4.5 million people eligible for jury duty in the Houston area. *Skilling*, 130 S. Ct. at 2915. Noting the “large, diverse pool of potential jurors,” the Court found that “the suggestion that 12 impartial individuals could not be empaneled is hard to sustain.” *Id.*

While the parties in this case dispute the exact number of eligible jurors in the District of Utah, the size of the potential jury pool in the District of Utah is much more akin to the pool in *Skilling* than *Rideau*. The District of Utah is comprised of the entire State of Utah, which has a population of 2.8 million. The jury pool, therefore, draws from a large geographic area and consists of a diverse set of people. This is not a case where there is a heightened risk of prejudice in a small community.

Defendant raises concerns about the involvement of the community in the search for Elizabeth Smart. While Defendant estimates that 9,000 to 10,000 members of the community

volunteered in the search, the majority of volunteers were likely drawn from only Salt Lake County where the search was focused. More than 1.7 million people live outside of Salt Lake County. Even excluding the large number of volunteers who helped search, the court has a large population to draw from in selecting potential jurors. The court, therefore, finds that the size of the jury pool in this district does not support a presumption of prejudice.

### 3. *Nature of the Publicity*

Next, with respect to pretrial publicity, the *Skilling* Court focused more on the nature of the publicity than the volume. The Court looked at whether the news stories were “the kind of vivid, unforgettable information we have recognized as particularly likely to produce prejudice.” *Id.* at 2916. The Court explained that “although the news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight.” *Id.* In contrast to the case before it, the Court explained that “Rideau’s dramatically staged admission of guilt,” which was repeatedly televised in a small community, “was likely imprinted indelibly in the mind of anyone who watched it.” *Id.*

In this case, Defendant points to the large volume of articles published about Elizabeth Smart’s kidnaping, her recovery, her family’s involvement in assisting other victims, and the legal proceedings against Mr. Mitchell. While the number of articles regarding the kidnaping may demonstrate the interest of the public at that time, only the coverage identifying Mr. Mitchell with the kidnaping and discussing the present legal proceedings are relevant to the court’s determination of potential juror prejudice. Less than half of the *Salt Lake Tribune* articles cited by Defendant, make any mention of Mr. Mitchell. *Cf. Skilling*, 130 S. Ct. at 2916 n.17

(noting that “[t]he Fifth Circuit . . . did not separate media attention aimed at Skilling from that devoted to Enron’s downfall more generally”); *United States v. Haldeman*, 559 F.2d 31, 60-60 (D.C. Cir. 1976) (noting that “appellants’ submissions overstate the amount of publicity by including, apparently, every story concerning the many difficulties of the last years of the Nixon administration, whether or not those stories discussed appellants”). Therefore, Defendant has significantly overstated the volume of publicity relevant to the issue before the court.

In addition, with respect to the nature of the publicity, Defendant’s expert has exaggerated the inflammatory nature of the media coverage by failing to target the use of inflammatory words to Mr. Mitchell or his alleged conduct. Defendant’s expert produced a superficial, rudimentary word count to support the defense’s position. While claiming that the word evil has been used in reference to Mr. Mitchell on 43 occasions, only five references to “evil” in the *Salt Lake Tribune* relate to Mr. Mitchell. Of the five references, three are quotes from Elizabeth Smart’s testimony at the competency hearing giving words to describe Mr. Mitchell and one is a quote from a deputy county attorney’s statement during legal proceedings in state court in which the attorney stated that Mr. Mitchell sought to do “unspeakable evil” based on his religious beliefs. *See United States v. Sabhnini*, 599 F. 3d 215, 232-33 (2d Cir. 2010) (“While a district court may consider the government’s role in generating adverse publicity in deciding a motion for change of venue, legitimate advocacy at a court proceeding – even advocacy resulting in adverse publicity – does not constitute conduct for which the government is properly held responsible in a Rule 21(a) inquiry.”). The only other reference to Mr. Mitchell’s conduct being evil appeared in a point/counterpoint commentary in the *Salt Lake Tribune* in 2003. All of these references will have been published from one to seven years prior to trial.

In addition, the defense points to the use of the term “scum-sucking slugs” as demonstrating media coverage prejudicial to Defendant. However, the term was used in a 2003 article warning against excessive or prejudicial publicity. The article stated that it would be nice to empanel a jury that “hasn’t been drubbed senseless with media musings about what scum-sucking slugs these two defendants are.” The defense’s reliance on this term to show prejudice demonstrates that it has given no regard to the context in which some of these allegedly inflammatory terms were used. Under the dictates of *Skilling*, however, the court must focus on the nature of the publicity, not just word counts.

Furthermore, the defense claims words such as disappearance, missing, rape, tethered, chained, and polygamy are inflammatory, but they are nothing more than descriptions of the facts at issue in the case. The “media coverage of this case ‘was essentially factual and was not directed at arousing or inciting the passion of the community.’” *Mills v. Singletary*, 63 F.3d 999, 1011-12 (11<sup>th</sup> Cir. 1995). The *Skilling* Court noted that “when publicity is about the event, rather than directed at individual defendants, this may lessen any prejudicial impact.” *Skilling*, 130 S. Ct. 2916 n.17.

While coverage of the hearing to determine Defendant’s competency to stand trial was factually extensive, the court found the reporting to be even-handed and limited to the evidence presented by both the prosecution and the defense. The defense expert’s assertion that little or no cross-examination was reported is not supported by the evidence. Defendant’s evidence was as fully reported as the prosecution’s. Moreover, to the extent that there may have been some limited reporting of evidence that was admissible at the competency hearing but may not be admissible at the trial, the court can deal with that issue during voir dire. However, the majority

of evidence admissible at the competency hearing will also be admissible at trial. In any event, such evidence was not extensive or inflammatory enough to rise to the level of demonstrating presumed prejudice.

The court recognizes that its finding that Defendant is competent to stand trial was widely reported. While the court's decision was lengthy, the articles reporting on the decision were not. Most of the articles gave little more than the *Dusky* standard. Defendant expresses concern over the court's decision, in part, because the *Salt Lake Tribune* included a link to the entire court ruling on its website. But the relatively few members of the potential jury pool who read the entire ruling on-line could easily be identified through the use of an initial juror questionnaire.

After the court found Defendant competent to stand trial, there were news reports expressing the view that the trial in this matter was overdue. Those views, however, were directed at the legal process and made no comment on the guilt or innocence of Defendant. None of the news media expressed whether they agreed with the competency decision or took a position on Defendant's intention to raise an insanity defense at trial. In fact, the news reported a quote from defense counsel disagreeing with the court's ruling and expressing how extremely mentally ill he believed his client to be.

The court finds that media coverage regarding Defendant's mental health has been fact-based and even-handed. Even though Defendant's main defense at trial will be an insanity defense, Defendant has not demonstrated any media prejudice in this regard. In fact, reports referring to Defendant's homeless lifestyle, his grandiose religious beliefs, and his disruptive singing in court are likely more favorable than unfavorable to his insanity defense.

As in *Skilling*, after reviewing all of the evidence Defendant presented regarding pretrial

publicity, the court finds that “‘incidents [of news reports using] less-than-objective language’ were dwarfed by ‘the largely fact-based tone of most of the articles.’” 130 S. Ct. 2908 n.3. Isolated statements over the span of eight years are not enough to demonstrate presumed prejudice throughout the entire District of Utah. *See id.* at 2916 (taking issue with Fifth Circuit’s reliance on only the magnitude and tone of media attention and explaining that “pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial”).

#### 4. *Time Between Alleged Crime and Trial*

In determining whether presumed prejudice existed, the *Skilling* Court also found it relevant that four years had elapsed between Enron’s collapse and Skilling’s trial. 130 S. Ct. at 2916. Whereas, in *Rideau*, where the Court found presumed prejudice, the trial “swiftly followed a widely reported crime.” *Id.* In this case, trial is set to begin on November 1, 2010, which is more than eight years after Elizabeth Smart was kidnaped and more than seven years after Defendant was arrested.

Defendant, however, argues that even a lengthy delay can be prejudicial if members of the potential jury pool have already made up their minds about the guilt or innocence of the defendant. This argument, however, is not supported by case law which routinely refers to continuances as a remedial measure. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Supreme Court explained that “where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.” *Id.* at 363 ; *see also* 130 S. Ct. at 2917 (when co-defendant entered a well-publicized guilty plea shortly before trial, court appropriately “delayed the proceedings by two weeks”).

Furthermore, courts generally find “no presumption of inherent unfairness where there has been a substantial delay between the criminal act and the trial.” *United States v. Nelson*, 347 F.3d 701, 709 (8<sup>th</sup> Cir. 2003); *see also Goss v. Nelson*, 439 F.3d 621, 632-33 (10<sup>th</sup> Cir. 2006) (“The passage of time before trial—in this case over a year—also diminishes the presumptive impact of publicity occurring at the time the crime was committed.”). The *Skilling* Court noted that although reporters continued to cover Enron-related stories, “the decibel level of media attention diminished somewhat in the years following Enron’s collapse.” 130 S. Ct. 2916.

Similarly, in this case, more than half of the articles Defendant cites were published within the first two years of Elizabeth Smart’s disappearance. Since the beginning of this year, the *Salt Lake Tribune* has published only 13 articles mentioning Defendant despite the fact that competency issues were briefed by the parties and decided by the court, Defendant’s co-defendant was sentenced, Defendant’s trial was set, Defendant filed the present motion for change of venue, Defendant filed his notice of insanity defense, and the government requested a pre-trial hearing regarding the insanity defense. The media coverage has significantly diminished over time and consists of fact-based reporting of significant case proceedings. The court does not view that type of routine publicity to be prejudicial. The court finds, therefore, that Defendant has presented no evidence to demonstrate that the delay in his case has caused him any prejudice in being able to select a jury in this district.

##### 5. *Community Impact*

The *Skilling* Court further determined that despite the Fifth Circuit’s reliance, in part, on community impacts to find a presumption of prejudice, “Enron’s ‘sheer number of victims,’” did not “trigger a presumption of prejudice.” 130 S. Ct. at 2917 (citation omitted). The *Skilling*

Court emphasized that an extensive questionnaire and follow-up voir dire were measures well-suited to counteracting the widespread community impact. *Id.*

In this case, Defendant makes several arguments related to community impact or community investment in the case. First, Defendant equates the number of people who searched for Elizabeth Smart with the number of victims in other high-profile cases, such as the victims of the Oklahoma bombing and victims of Enron's collapse. In addition, Defendant argues that the community impact can be seen in the number of people who perceive Mitchell as guilty and know that a judge has found him competent to stand trial.

Although Defendant estimates that 9,000 to 10,000 members of the community participated in the search for Elizabeth Smart, Defendant fails to demonstrate how or why those people, or people who know someone who participated in the search, should be considered victims of the alleged kidnaping. In comparing this case to *McVeigh* and *Skilling*, Defendant fails to look at the nature of the impact. Defendant repeatedly refers to those who searched for Elizabeth Smart and people who knew someone who searched as equivalent to someone who died or knew someone who died in the Oklahoma City bombing. But the nature of the impact is strikingly dissimilar. Someone who knows someone who spent part of a day searching for a missing child is not impacted to the same extent as someone who knows someone who was killed or injured. Similarly, knowing someone who searched for a missing child is different than knowing someone whose retirement was wiped away as a result of white collar crimes. While a white collar crime may not evoke the same kind of animosity as a child kidnaping, the personal impact from Enron's collapse in the Houston area was much more widespread than the personal impact resulting from the kidnaping of one child in the State of Utah. By attempting to expand

the scope of victims to those who know someone who searched, the defense's arguments lose credibility. Merely knowing someone who participated in the search is such a remote connection to the case that it could not be reasonably expected to influence a potential juror.

In *McVeigh*, every district judge in the district recused from hearing the case. And, in *Skilling*, the prosecution had to be turned over to attorneys from outside of the district because of the numerous conflicts within the United States Attorney's office. In this case, there are no such conflicts as a result of Elizabeth Smart's kidnaping. And, in fact, one member of the defense team participated in the search and is able to set that prior involvement aside to zealously advocate for his client. While the circumstances of Elizabeth Smart's kidnaping and recovery captured the attention of the country and community more than most kidnapings, that attention did not create a large number of victims in the same nature as Enron's bankruptcy or the bombing of an entire office building of workers. In Houston and Oklahoma City, large numbers of the community were actually victimized. In this case, the victims are the same as other kidnaping cases, the child and her family.

Moreover, even though the Smart family chose to become involved in legislative action as a result of the kidnaping, those efforts do not demonstrate community prejudice against Defendant. While the legislation is a positive community impact, there is no evidence that the family's involvement in getting the legislation passed will cause juror's to decide Defendant's case differently. Neither the legislation nor the Smart's family public involvement bears on a finding of community prejudice.

The widespread community involvement in searching for Elizabeth Smart was commendable, but that effort does not demonstrate a presumption of prejudice as to the millions

of Utahns eligible to serve on a jury. Given the number of the people who participated in the search and the number of people eligible to serve on the jury, the court can easily exclude anyone who participated in the search. Moreover, as the *Skilling* Court instructs, the court can employ extensive questionnaires and voir dire to identify members of the community who may be too invested in the outcome of the case. As discussed above, the number of searchers does not unduly limit the number of potential jurors. There are still millions of citizens who had no involvement in the search. The community impact is not so vast that the court cannot expect to find twelve disinterested jurors.

Defendant, however, questions the court's ability to find twelve disinterested jurors based on his expert's survey finding that 92% of Utahns believe Mitchell is probably or definitely guilty. Defendant's surveys also show that 77% of Utahns answered affirmatively when asked if they had read, seen, or heard that a judge had declared Mr. Mitchell competent to stand trial. While the court recognizes that Defendant contests his factual guilt and it is the government's burden to prove that guilt beyond a reasonable doubt, the court notes that Defendant did not conduct a survey relating to his insanity defense. Defendant's counsel publicly announced that they would rely on an insanity defense in his public statements regarding the court's ruling on competency. While Defendant is fully entitled to attack the government's evidence regarding factual guilt, his counsel has not indicated an intention to do so until the reply brief supporting this motion. Curiously, Defendant's attacks on factual guilt were not included in the survey. Defendant could have easily asked questions regarding whether Defendant had permission to take Elizabeth Smart or was mistaken for someone else who may have taken her. His survey could have asked whether respondents knew that such matters were contested, but it did not.

Defendant's survey did not even require respondents to identify Mr. Mitchell by name. It actually supplied his name to the respondents. Therefore, the court does not even have data on how many respondents may or may not have been able to identify Mr. Mitchell as Elizabeth Smart's alleged kidnaper. In addition to not asking respondents an open-ended question regarding who was alleged to have kidnaped Elizabeth Smart, the survey also failed to mention the specific crimes alleged, the elements of those crimes, and the burdens of proof in the legal proceedings. The court has serious concerns regarding the validity of the responses given the failure to ask these relevant questions.

Defendant's survey was most strikingly silent on the insanity defense. Academically, Defendant may want to focus on his presumption of innocence. But, in reality, he must focus on the nuts and bolts of his defense. Defendant cannot ignore, for purposes of his change of venue motion, that the main focus of his defense at trial will be the insanity defense. His experts completely ignored his main defense. The court is left with no data relevant to the public's perception of Defendant's insanity defense or his perceived mental health. This information is of critical importance in this case because it relates to Defendant's perceived legal guilt.

The court also has serious reservations regarding the methodology used by Defendant's experts. The court finds that the survey's use of leading questions and failure to include meaningful details renders the survey nearly useless in determining the present motion. Moreover, the survey is inadequate in demonstrating whether potential Utah jurors have a fixed opinion as to whether Defendant is legally responsible for his alleged actions. The survey asked respondents if they were aware of this court's ruling on competency, but did not ask what they knew with respect to the ruling or whether they agreed with it. The question that was used does

nothing to demonstrate any effect this court's prior ruling had on the jury pool. Nonetheless, the court believes that an extensive juror questionnaire and voir dire can be employed to determine prejudice that may have resulted from this court's extensive findings on competency. If any member of the jury pool has actually read the court's competency decision, the court can excuse the person for cause.

The court concludes that Defendant has not demonstrated the kind of widespread community impact or community investment in the outcome of a case that is required for finding presumed prejudice. As in *Skilling*, Defendant has failed to demonstrate that his concerns regarding community impact cannot be adequately addressed and ameliorated through an extensive juror questionnaire and voir dire.

#### 6. *Co-defendant's Plea*

Unlike the co-defendant in *Skilling* who pleaded guilty on the eve of trial, necessitating a two-week continuance of the trial, Mitchell's co-defendant pleaded guilty a year before his scheduled trial date. *See* 130 S. Ct. at 2917. The *Skilling* Court recognized that "[a]lthough publicity about a codefendant's guilty plea calls for inquiry to guard against actual prejudice, it does not ordinarily . . . warrant an automatic presumption of prejudice." *Id.* In the present case, the codefendant's plea may have been highly publicized, but the plea and sentencing occurred well before Defendant's scheduled trial. Moreover, to the extent that Defendant's main defense is the insanity defense, her plea has little relevance to Defendant's state of mind at the time of the alleged crime. The court believes that the fact that a co-defendant pleaded guilty can be addressed in the juror questionnaire and voir dire.

Having analyzed each of the factors considered in *Skilling* for determining presumed

prejudice under the constitutional standard, the court concludes that this is not one of the extreme cases where a change of venue based on presumed prejudice is constitutionally required.

### **III. Rule 21**

Even though the court finds that Defendant has not demonstrated presumed prejudice under the constitutional standard, the court could choose to exercise its discretion under Rule 21 and transfer venue to another district. As stated above, under the Rule 21 standard, “it is the well-grounded fear that the defendant will not receive a fair and impartial trial which warrants the application of the rule.” *United States v. Marcello*, 280 F. Supp. 510, 514 (E.D. La. 1968). Rule 21 requires the court to be “satisfied” based on the evidence before the court “that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial.” Fed. R. Crim. P. 21(a); *see also McVeigh*, 918 F. Supp. 1467, 1469-70 (E.D. Okla. 1996).

The government argues that the issue of transferring venue under Rule 21 is a much closer call than the constitutional inquiry. However, based on most of the same factors the court analyzed under the constitutional standard for presumed prejudice, the government argues that Defendant has failed to meet his burden of demonstrating prejudice and the court should not exercise its discretion under Rule 21 to change venue at this time. The government asks the court to review the issue again after juror questionnaires are completed.

When the court set the trial date in this case, the parties and court agreed to several pretrial deadlines. These deadlines included dates for the parties to prepare and the court to review an initial juror questionnaire that would be sent to approximately 500 eligible jurors. The parties and court have since agreed to summon potential jurors to appear at the courthouse to fill

out a juror questionnaire one month prior to trial. The court will then conduct individual voir dire of the smaller number of potential jurors summoned at the beginning of trial. The court and parties, therefore, will have approximately a month between the time that the questionnaires are filled out and the individual voir dire occurs at the beginning of trial.

The *McVeigh* court recognized that “the preferred practice in this judicial district” is to determine the effect of pre-trial publicity on the pool from which jurors are drawn through “a careful and searching voir dire.” *Id.* at 1470. Other courts discussing the timing of change of venue motions have recognized that the “rule itself provides that the transfer may be made when the court is ‘satisfied.’” Thus by the very terms of the rule, venue may be changed whenever the court ‘satisfied, whether this be at some time prior to the voir dire, at the voir dire, or at the trial itself.” *Marcello*, 280 F. Supp. at 514. Therefore, at any time the court is satisfied that a totality of the circumstances favor transfer, the court can make its determination.

At this time, based on the evidence presented by Defendant, the court is not satisfied that so great a prejudice exists in this district that Defendant cannot receive a fair and impartial trial. Although the court’s analysis above relates to the constitutional standard for presumed prejudice, the court believes many of the same factors are relevant to court’s decision under Rule 21. The court, therefore, relies on its analysis above for purposes of Rule 21 as well. While the court may have relied more heavily in its Rule 21 analysis on Defendant’s survey data, the inadequacies in Defendant’s survey, outlined above, leaves the court with considerable questions as to whether there is a reasonable likelihood of prejudice against Defendant in this district. In general , the questions in the survey were too broad, too leading, and too lacking in details relevant to legal proceedings to provide useful information. These inadequacies call into question the percentages

regarding Defendant's guilt and provide no real data regarding the perception in this district of Defendant's legal guilt.

Due to the high-profile nature of this case, however, the court undoubtedly has concerns regarding the appropriateness of holding Defendant's trial in this district. But the court believes that its concerns may be effectively addressed and answered through the use of the juror questionnaire that the court and parties plan to employ prior to the actual voir dire. Because the juror questionnaire can be tailored to ascertain pertinent information prior to the actual voir dire, the court concludes that it will reserve its ruling on a transfer of venue under Rule 21 standards until after it has reviewed the responses to the juror questionnaire.

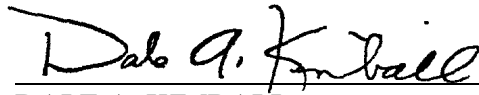
Defendant relies on the district court's decision in *McVeigh* to assert that it may be prejudicial for the court to delay its transfer of venue ruling. The *McVeigh* court stated that "a failed attempt to select a jury would, itself, cause widespread public comment creating additional difficulty in beginning again at another place for trial." 918 F. Supp. at 1470. Although a failed attempt to seat a jury during voir dire at trial may garner widespread publicity, determining the change of venue motion after juror questionnaires are filled out is not significantly different than deciding the motion at the present time. The determination will still be made in the pretrial stages of the case. Moreover, the value of the information that can be gained through the responses to that questionnaire substantially outweighs the slight delay in the court's determination. Accordingly, the court reserves its ruling on Defendant's change of venue motion until such time as it has viewed the responses to the upcoming juror questionnaire. The court is not satisfied at this time that Defendant has demonstrated so great a prejudice in this district as to require a transfer of venue under Rule 21.

### CONCLUSION

Based on the above reasoning, Defendant's Motion to Change Venue is denied under the constitutional standards of presumed prejudice. The court, however, will rule on Defendant's change of venue motion under Rule 21 after it has reviewed the responses to the juror questionnaire. One week after the parties receive the responses to the juror questionnaires, they may each file a ten-page supplemental memorandum in relation to the motion to transfer of venue. The court will then issue its final ruling on the motion as expeditiously as possible.

DATED this 16<sup>th</sup> day of August, 2010.

BY THE COURT:

  
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DALE A. KIMBALL  
United States District Judge

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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH**

**CENTRAL DIVISION**

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**UNITED STATES OF AMERICA,**

Plaintiff,

v.

**BRIAN DAVID MITCHELL, et al.,**

Defendants.

**MEMORANDUM DECISION  
AND ORDER**

**Case No. 2:08CR125DAK**

**Judge Dale A. Kimball**

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This matter is before the court on Media Intervenors Deseret News Publishing Company, The Salt Lake Tribune, The Associated Press, the Utah Headliners Chapter of the Society of Professional Journalists, and the Utah Press Association's Motion for Access to Blank Juror Questionnaire and Completed Juror Questionnaires with Identifying Information Redacted. The United States and Defendant have filed memoranda in opposition to the motion, and the Media Intervenors have filed a reply memorandum. Therefore, the matter is fully briefed. Because of the need for an expedited ruling on the issues presented in the motion, the court issues the following Memorandum Decision and Order without oral argument.

**BACKGROUND**

In mid-September 2010, the court summoned 600 jurors to fill out a preliminary juror questionnaire at the courthouse. Approximately 500 jurors attended sessions on September 30, 2010, and October 1, 2010. After the court assessed potential hardships for the five-week trial period and released several jurors on hardship grounds, approximately 330 jurors completed the

juror questionnaires.

Prior to completing the juror questionnaires, the court instructed the potential jurors that their responses would be used solely to assist the judge and the attorneys in selecting a fair and impartial jury for this case. The court further told the potential jurors that, during the jury selection process, the completed questionnaires would be kept confidential by the court and the attorneys representing the parties to the case and that, after a jury was selected, the court would keep the completed questionnaires under seal until the conclusion of all legal matters in the case.

The court's instructions to the potential jurors were based on past procedures used in other high-profile cases in this district and also on the parties' Joint Proposal for Protocol and Procedures for Juror Questionnaires and Voir Dire, which was publicly filed on September 7, 2010. The Joint Proposal specifically stated that the completed questionnaires would be kept under seal. Although the Joint Proposal was publicly filed and the Media Intervenors are intervenors in this action for the purpose of ensuring access to judicial documents and court proceedings, the Media Intervenors did not file any opposition to the proposal stating that the completed questionnaires would be kept under seal. Instead, the Media Intervenors waited approximately six weeks to file their motion seeking immediate access to the blank questionnaire and prompt access to the completed questionnaires. Had the media timely filed an opposition to the proposal to keep the questionnaires under seal, the court could have addressed their concerns prior to the completion of the questionnaires. The court is now in the position of addressing the media's access concerns after having promised jurors that their responses were confidential and would be kept under seal.

## DISCUSSION

The Media Intervenors seek immediate access to the blank juror questionnaire used in this case and, prior to the start of individual voir dire, copies of the questionnaires completed by potential jurors with personal identifying information redacted. The United States and Defendant both agree that the media is entitled to a copy of the blank questionnaire and redacted copies of the completed questionnaires. The disputed issue, however, is the timing of the court's release of that information.

### A. Completed Questionnaires

The standard in the Tenth Circuit for public access to documents in the court's possession is addressed in *United States v. McVeigh*, 119 F.3d 806 (10<sup>th</sup> Cir. 1997). The *McVeigh* court stated that, assuming the First Amendment standard "extends to at least some types of judicial documents, the question remains whether that right applies to the particular types of documents at issue in this case." *Id.* at 812. "In determining whether a particular type of document is included within the First Amendment right of access, courts engage in a two-pronged inquiry in which they ask: (1) whether the document is one which has historically been open to inspection by the press and the public; and (2) 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* at 812 (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*"). This test is also referred to as the "experience and logic" test. *Id.* at 813. "If the qualified First Amendment right of access is found to apply to the documents under the 'experience and logic' test, the district court may then seal the documents only if 'closure is essential to preserve higher values and is necessary to serve that interest.'" *Id.* at 812-13 (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510

(1984) (“*Press-Enterprise I*”).

The first question for the court to consider is whether the written questionnaires in this case are part of the voir dire process. While the Media Intervenors state that several state court decisions have considered the questionnaires part of voir dire, there is no controlling federal law on the subject. In fact, the Tenth Circuit’s recent ruling in this case denying Defendant’s Petition for Writ of Mandamus stated that “voir dire has yet to take place” and consideration of Defendant’s arguments “prior to voir dire would be premature and uninformed.” The Tenth Circuit was well aware that the dispute regarding venue has been decided using preliminary juror questionnaires.

Admittedly, the Tenth Circuit was considering a separate issue. But its decision that consideration of the transfer of venue motion prior to voir dire would be premature and uninformed appears to equally apply to the propriety of reporting on the substance of the questionnaires prior to the completion of a prospective jurors’ completed voir dire. The Tenth Circuit’s decision also suggests that there is no present right to the contents of the questionnaires for purposes of commenting on the jurors’ attitudes toward this case because they will be clarified during individual voir dire.

The court’s only concern in this regard is that the court relied on portions of the questionnaires to determine that it was not satisfied under Rule 21 of the Federal Rules of Criminal Procedure that there were fixed beliefs regarding Defendant’s factual or legal guilt. The court recognizes that once it has relied on documents to make a public ruling, there is a greater argument that the press should be allowed access to the documents to perform its watchdog function. The parties and court have also relied on responses to the questionnaire to

dismiss 123 potential jurors from the venire. If the court and parties were inclined to believe that those juror's responses appeared to be sufficiently fixed on given issues to discontinue that juror's participation in the case and excuse the juror prior to live voir dire, the court and parties have essentially used the questionnaires as part of the voir dire process.

In *Press-Enterprise I*, the Supreme Court recognized that the voir dire process is an important aspect of a criminal trial that has been traditionally open to the public. 464 U.S. at 508. "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Id.* An open process, therefore, "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.*

The Court also explained, however, that "the jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that the person has legitimate reasons for keeping out of the public domain." *Id.* at 511. As stated by Justice Blackmun in his concurring opinion, "[c]ertainly, a juror has a valid interest in not being required to disclose to all the world highly personal or embarrassing information simply because he [or she] is called to do his [or her] public duty." *Id.* at 514 (Blackmun, J. concurring). The *Press-Enterprise I* Court also recognized that "[n]o right ranks higher than the right of the accused to a fair trial." But, as for guidance in this area, the Court merely stated that "the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness." *Id.* at 508.

The trial in *Press-Enterprise I* involved an alleged rape of a teenage girl. *Id.* at 512. In that context, the Court recognized that "[s]ome questions may have been appropriate to prospective jurors that would give rise to legitimate privacy interests of those persons." *Id.* The court provided as an example a prospective juror who may "privately inform the judge that she, or a member of her family, had been raped." *Id.* In such an instance, "the privacy interests of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process." *Id.* The Court provided the following guidance for conducting the balancing test:

To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record. By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy. This process will minimize the risk of unnecessary closure.

*Id.*

Because of the nature of this case, the preliminary written questionnaires asked prospective jurors about several intimately personal issues. Specifically, the questionnaires asked for details about the person's or the person's family members' mental health, history of therapy and counseling, sexual abuse and other similar crimes, and details of the person's religious beliefs and practices. Because the court promised potential jurors that the information would be kept under seal, prospective jurors were remarkably candid and forthcoming.

The court now recognizes that its promise to the jurors regarding the confidential nature

of their questionnaire responses was potentially at odds with the process detailed in *Press Enterprises I* if the court considers the written questionnaires to be part of voir dire. Under the *Press-Enterprise I* process, the court may have more properly informed the jurors of the presumed openness of the voir dire process and the necessity for them to affirmatively seek to have the information kept private. These issues, however, were not raised at the time this court was preparing its instructions to the prospective jurors. As noted above, the Media Intervenors did not object to the Joint Proposal of the parties requesting that the questionnaires be kept under seal.

In any event, the court's instructions to the prospective jurors that their responses to the questionnaires would be kept sealed throughout the legal proceedings in this case has caused no harm to the media's rights to date. The media has not cited to any controlling case requiring media access to a written questionnaire at the time it is filled out and such a requirement would appear to be contrary to case law stating that documents in the court's possession are not public until the court relies on the information for some public purpose. Unlike *Press Enterprises I*, this case involves not just in-court, live voir dire but a two-step process with a written questionnaire and in-court, live voir dire. Because of that distinction, *Press-Enterprise I* is not entirely instructive in this matter. As discussed above, the court is not convinced that the written questionnaire can be deemed voir dire. To the extent that the questionnaires were used to determine "for cause" dismissals of potential jurors those questionnaires were part of voir dire. But it is clear that the voir dire process is not complete for a majority of the venire members.

In a typical criminal case, the media is given no advance copy of the proposed voir dire questions. Generally, the media attends the session of court and then reports on what happened.

In this case, the Media Intervenors assert that they are somehow disadvantaged because the parties will have spent "hundreds of hours reading and analyzing the questionnaires," but the public has not had the same opportunity to study the questionnaires and consider their importance in the process. This argument ignores the fact that the parties, not the public or the press, are charged with selecting a fair and impartial jury in this case. The parties will be conducting the questioning at the live voir dire, with limited questioning by the court.<sup>1</sup> As is typical, the press and public will not participate in that process other than to observe and report on what occurs.

Under the experience and logic test, the live voir dire process is open to the public. Because the written questionnaire are relied on as part of that process, the court understands why the cases cited by the Media Intervenors have found the questionnaires presumptively public documents. But there is no historic tradition of granting access to a document before it is relied upon by the court for some purpose. In addition, the second prong of the experience and logic test, asking whether public access plays a significant positive role in the functioning of the particular process in question, would support a finding that written questionnaires are not public until they are relied on by the court. Traditionally, the media has played a positive role in the voir dire process by reporting on the process for selecting a fair and impartial jury.

In this case, however, access to and reporting on only part of an prospective juror's voir dire responses would not necessarily be beneficial and could actually give an inaccurate

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<sup>1</sup> Contrary to the court's usual practice, the court has agreed to allow counsel to conduct the individual voir dire in this case. If the court has concerns with the way such questioning proceeds, the court may resume primary responsibility for the questioning. But, in no event, will the court allow members of the media or their counsel to participate in questioning.

perception to the public. The court has already ruled that many of these potential jurors require additional questioning before the court can determine whether to excuse them for cause. Due to the nature of the process, a juror may have misread a question or given an answer that needs to be explained or clarified. Reporting on such answers prior to clarification may actually mislead the public.

The government proposes that the press be given copies of redacted questionnaires at the end of each trial day for the prospective jurors who complete their live voir dire on that day. The Media Intervenors do not address this proposal in their reply. The court, however, considers the proposal a helpful means for accommodating the media's need to cover the trial proceedings each day while also allowing the court to notify the prospective jurors of the need to assert a privacy right to certain information and the parties' and court's need to further question these prospective jurors prior to determining dismissals for cause. The court intends to make rulings on dismissals for cause at the conclusion of each potential juror's individual voir dire. Therefore, the government's proposal would allow for media access to the questionnaire on the same day as the voir dire for that prospective juror is complete. Such a process would not significantly alter the press' traditional role or type of coverage for voir dire proceedings.

And, importantly, the government's proposal would allow the court to inform the prospective jurors that, while all identifying information will be redacted, other information may be released. The Media Intervenors unduly discount the parties' concerns relating to the court's promise to prospective jurors as speculative. The court recognizes that appellate courts have stated that such promises cannot override constitutional requirements. While this is true, none of those courts was in a position to notify prospective jurors of their privacy rights and assess the

prospective jurors reaction to a release of the previously provided written information. The overriding principles in the area is to balance the rights of the individuals involved with the rights of the Defendant and the rights of the public. Moreover, if Defendant has concerns with respect to a prospective juror's reaction to learning that his or her information may become public, the best approach would be for the court to assess that individual's reaction in the context of the individual voir dire.

The court specifically relied on the potential jurors' responses to questions 22 to 46 and 66 to 71 on all 330 written questionnaires in ruling on the change of venue motion. These same responses were the basis for the court's eight "for cause" dismissals prior to trial. Because no other part of those eight questionnaires was relied upon by the court to make its for cause determinations, the court finds no basis for releasing the other portions of those prospective jurors' questionnaires. The court is willing to allow the Media Intervenors access to those portions of those eight questionnaires immediately.

While the court agreed with the parties' stipulation to excuse 115 of the prospective jurors for cause based on the contents of their written questionnaires, the court does not know the specific reasons for the dismissal of each of the 115 prospective jurors. Many may have been removed based on their responses to the questions relied upon for the venue ruling. Some of those jurors, however, may have been removed for knowing participants in the trial or other responses not related to the change of venue motion. The court requests the parties to identify the basis for each of the 115 stipulations for cause so that the court can release the relevant response relied upon for finding a "for cause" dismissal. If the removal for cause is related to a response other than the change of venue responses, the media should be given access to that

response in addition to the venue related questions so it can accurately report how the jury was selected in this case.

With respect to the remaining prospective jurors who may be called in for individual voir dire, the court will not release the portions of their questionnaires relating to the venue ruling until that prospective juror has concluded individual voir dire. Because those jurors will be further questioned, their responses may be clarified or modified during the live voir dire. It would not be helpful to the process for those jurors' written responses to be reported on before the live voir dire is complete. Those prospective jurors' questionnaires will be released at the end of the day on which that juror has concluded their individual, live voir dire.

If there are prospective jurors in this category who are eventually not needed for live voir dire because the court reaches the number of jurors necessary to empanel a jury before those prospective jurors' questionnaires will be released after the jury is empaneled and only the venue related questions, questions 22-46 and 66-71, will be released at that time. *See In re Derderian*, 2006 WL 2942786, \*2 (R.I. Super. Oct. 12, 2006) (unpublished) (refusing request to release completed questionnaires when defendant changed plea before trial and explaining that because no juror was called to be orally questioned and no jury seated "the release of the filled-in juror questionnaires serves no legitimate public interest under the First Amendment except to engage in rank speculation or to satisfy idle curiosity.")

The parties also dispute what information should be redacted from the questionnaires when access to the questionnaires is allowed. The Media Intervenors agree to a redaction of personal identifying information but nothing else. The main dispute, therefore, focuses on the release of responses relating to highly personal and sensitive topics such as sexual abuse, mental

health and counseling issues, and religious beliefs and practices. Relying on Justice Marshall's concurring opinion in *Press-Enterprise I*, the Media Intervenors assert that "the constitutionally preferable method for reconciling the First Amendment interests of the public and the press with the legitimate privacy interests of jurors and the interests of defendants in fair trials is to redact transcripts in such a way as to preserve the anonymity of jurors while disclosing the substance of their responses." 464 U.S. at 520 (Marshall, J., concurring).

The majority opinion in *Press-Enterprise I* found that the trial judge erred in not considering "whether he could disclose the substance of the sensitive answers while preserving the anonymity of the jurors involved." *Id.* at 513. This language does not require a court to disclose the substance of all sensitive information just because the prospective juror's name is withheld. It merely tells the court to consider what impact the anonymity of the juror has on the release of the information. In most cases juror anonymity would probably allow the release of substantive information, but it may not be the answer in every case. If it were, the *Press-Enterprise I* Court could have announced a bright-line rule for disclosures. It did not do so. It established what it considered the appropriate process for balancing a prospective juror's privacy interests with the public's right of access and the defendant's right to a fair trial. The Court stated that by requiring the prospective juror to make an affirmative request, "the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy." *Id.*

In this case, where the court has already promised prospective jurors that the information would be kept under seal, a majority of questionnaires contain responses in the sexual abuse or mental health and counseling sections that appear to be potentially embarrassing to prospective

jurors and/or their family members. The court, however, cannot assume that every prospective juror would find this disclosure embarrassing if they knew that their name and other personal identifying information would not be released. The court will keep all personal identifying information sealed, such as the responses to Parts I and II of the questionnaire and question #80 if it identifies a specific individual by name. With respect to the potentially embarrassing information, if the court does not inquire of each prospective juror called in for individual voir dire, the court, on its own, might decide to seal more information than would the prospective jurors. And, conversely, without any individual juror input, the court could unknowingly release information that could potentially identify a prospective juror. The court agrees with Defendant that the nature of the questions and the forthcoming responses of some of the prospective jurors could lead to the potential identification of some jurors.

Accordingly, the court will employ the approach proposed by the government. If a prospective juror has the ability to address the issue of what information may be potentially embarrassing or make the prospective juror identifiable even with all apparent identifying information redacted, the court can properly balance the interests involved at the time of voir dire. The court finds that the prospective jurors are entitled to an explanation of their rights and an opportunity to assert their rights before the court determines what potentially sensitive information can be released. Because the release of the individual juror's written responses can be timely accomplished on the day of the prospective juror's individual voir dire, the court finds no undue harm to the rights of the media in gaining access to the responses on that day and reporting on them in the context of that prospective juror's entire voir dire.

This process will also allow the court to assess the juror's reaction to the public release of

his or her written responses. The Media Intervenors improperly discount Defendant's valid concerns regarding the prospective jurors' reactions. By necessity it can only be described in terms that appear speculative at this point, but the court does not believe that it is unfounded speculation. If a prospective juror demonstrates that he or she has difficulty with releasing information, the court can consider excusing that juror for cause. The court believes that the proper course is to give the juror the information and assess his or her response accordingly.

#### **B. Blank Questionnaires**

Furthermore, the United States and Defendant oppose the release of the blank juror questionnaire on the grounds that the court may need to have additional jurors fill out the questionnaires at a later date. The court does not believe it is likely that additional questionnaires will need to be filled out. However, even if there was such a need, the court fails to see how knowledge of the questions on the blank questionnaire would influence a prospective juror to provide false or less than candid information. As it did before, the court would instruct the prospective juror to fill out the questionnaire truthfully and require that he or she complete the questionnaire under oath. The court cannot assume that these traditional safeguards are inadequate. The court, therefore, finds that the Media Intervenors are entitled to immediate access to the blank questionnaire. The court will publicly docket both the blank questionnaire and the court's instructions relating to the questionnaires which it read to the prospective jurors prior to their completion of the questionnaires.

#### **C. Access to Courtroom During Individual Voir Dire Proceedings**

In the parties' briefing on the issue of the media's access to the blank and completed questionnaires, the Media Intervenors and the Defendant also raise the issue of the media's

courtroom access to the individual voir dire proceedings. Defendant requests that public access to the voir dire proceedings be accommodated via transmission to a separate room in order to maintain an atmosphere of candor. At past proceedings in this case, which the court would consider equivalent to the importance of jury selection, the courtroom has been full and there has been a need to allow seating in overflow areas. The legal teams on each side are themselves extensive in numbers.

The court agrees with Defendant that the number of sensitive topics that will be the subject of follow-up questioning, such as sexual abuse, rape, mental health, counseling, and religious beliefs, all provide a basis for the court to balance competing interests. The court agrees that the process is benefitted by a courtroom atmosphere conducive to full and honest disclosure and that it may be hampered if the prospective juror is asked these types of sensitive questions in the presence of 100 people. While an atmosphere conducive to candor would most likely be achieved by reasonably limiting the number of people in the courtroom, the court recognizes that the press and public generally have a right to be see and hear voir dire proceedings and a prospective juror cannot expect an empty courtroom. The court, therefore, must narrowly tailor any alternative.

Room 140 at the courthouse, which has been used as a media overflow room, has both a video and audio feed of the courtroom. While the video is in black and white, it gives a full view of counsel tables, the podium, the judge's bench, and the witness stand. The court intends to seat each prospective juror on the witness stand during that prospective juror's individual voir dire. The video generally gives an adequate feel for the proceedings in the courtroom. The court would also be benefitted by the efficiency of being able to turn off the audio feed when a juror

raises a request to speak privately on a sensitive topic rather than convening a “sidebar” conference in each such instance. None of the parties has cited a case finding a video and audio feed to be insufficient. Therefore, Room 140 appears to be a viable alternative.

The only limitations to use of Room 140 is that the available video does not permit the viewer to see the specific expression on the face of the person sitting in the witness stand and there may be space constraints. Room 140 holds approximately 45 people. Because of these limitations, the court is willing to allow nine pool reporters and two sketch artists to be present in the courtroom during the voir dire proceedings in the courtroom. The court will allow a similarly limited number of members of the public to attend the voir dire proceedings in the courtroom. Rather than being able to turn off an audio feed, the presence of the press and public in the courtroom will necessitate "sidebar" conferences when a juror requests to speak privately on sensitive topics. The court, however, believes that court's interests in efficiencies are secondary to the press and public's right of access.

The nine pool reporters in the courtroom should be a representation of the various types of media—for example, three from print media, three from broadcast media, two from radio, and one from online media. These pool reporters will be allowed to have laptop computers with them in the courtroom during the voir dire proceedings but they will not be allowed to transmit information from the courtroom. The pool reporters can share their information with other reporters at breaks and at the conclusion of each trial day in Room 140. The sketch artists in the courtroom during the proceedings must blur and make unidentifiable any image of a potential juror. The court's media contact shall ensure that all sketches meet with this requirement prior to the sketch's use.

The court also notes that under the Crime Victims Rights Act (“CVRA”), victims of the alleged crime are generally allowed to be present at all proceedings. *See* 18 U.S.C. § 3771. For the voir dire proceedings in this case, the court will allow the members of Elizabeth Smart's family to be present in the courtroom.

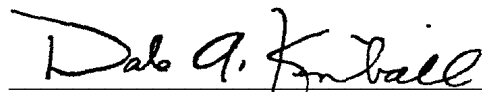
The court will assess the number of members of the public to allow in the courtroom on the morning of trial, but it intends to allow no more than twelve. The court concludes that the courtroom presence of nine pool reporters, a sketch artist, members of the Smart family, and approximately ten members of the public should not be a hindrance to an atmosphere of candor. The use of several pool reporters and the video and audio feed in Room 140 will also balance the press and public’s right of access to the proceedings. Given the number of sensitive issues relevant to the voir dire necessary in this case, this approach is intended to balance the interests of the public, the victim, and the parties. Prior to the start of trial, the court will issue a decorum order specific to the voir dire proceedings.

#### CONCLUSION

Based on the above reasoning, the Media Intervenors’ Motion for Access to Blank Juror Questionnaire and Completed Juror Questionnaires with Identifying Information Redacted is GRANTED IN PART AND DENIED IN PART as discussed above.

DATED this 29<sup>th</sup> day of October, 2010.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Dale A. Kimball", is written over a horizontal line.

DALE A. KIMBALL,  
UNITED STATES DISTRICT JUDGE